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In The

Supreme Court of the United States

ANDREW J. MARTIN, DANNY ROSS, LON FIELDS AND ROBERT WINSTEAD,

Petitioners,

v.

COMMONWEALTH OF KENTUCKY,

Respondent.

On Petition For A Writ Of Certiorari To The Supreme Court Of Kentucky (No. 2000-SC-1101)

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

May Petitioners permissibly be criminally prosecuted under campaign finance statutes defining "contribution" and "independent expenditure" that were held to be unconstitutionally overbroad under the First Amendment, but whose constitutionality was saved by a post-hoc limiting construction whereby the court supplied a wholesale judicial rewriting of the statutes in order to maintain the prosecution?

May the salary of a Union member for work performed in a Union "get out the vote" effort be considered to be a regulated "contribution" to a political campaign, rendering it subject to the contribution limits, reporting requirements, and criminal sanctions of the campaign finance laws, when there are no statutory or regulatory guidelines to define the difference between an unregulated independent expenditure by the Union for communications with Union members (and their families) and an illegal "coordination" between the Union and the political campaign?

May criminal liability be imposed under campaign finance reform statutes that do not require a showing of specific intent, but rather allow for a criminal conviction for political activities under a negligence standard that is based on what a defendant "should have known"?

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OPINIONS AND ORDERS BELOW

The majority and dissenting opinions of the Kentucky Supreme Court are reported at 96 S.W.3d 38 (Ky. 2003), and reprinted at Petitioners' Appendix ("Pet. App.") 1. The majority and dissenting opinions of the Kentucky Court of Appeals are not reported and are reprinted at Pet. App. 66-97 and 97-99. The opinion and order of the Franklin Circuit Court is not published and is reprinted at Pet. App. 101-03. The Indictments issued by the Franklin Circuit Court against Petitioners are not published and are reprinted at Pet. App. 107-110.

JURISDICTION

The Kentucky Supreme Court entered its final judgment on January 23, 2003. This Court has jurisdiction to review the final judgment by writ of certiorari under 28 U.S.C. § 1257(a).

STATUTES INVOLVED

This case involves the First Amendment of the U.S. Constitution (made applicable to the states through the Fourteenth Amendment to the U.S. Constitution), which provides that "Congress shall make no law . . . abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances."

Also involved are the statutory definitions in Kentucky law for "independent expenditure," "contribution," and "knowingly," as those statutes existed in 1995.

Ky. Rev. Stat. § 121.150(1), Kentucky's general statute limiting contributions, provided the definition of "independent expenditure":

> As used in this section "independent expenditure" means one made for a communication which expressly advocates the election or defeat of a clearly identified candidate or slate of candidates, or the passage or defeat of a constitutional amendment or public question which will appear on the ballot and which is not made with any direct or indirect cooperation, consent, request, suggestion, or consultation involving a candidate, slate of candidates, campaign committee, political issues committee, or agent. No candidate, slate of candidates, campaign committee, political issues committee, nor anyone acting on their behalf shall have any communications with another person nor anyone on his behalf regarding that person's making of an independent expenditure on his behalf shall have any communication with another person nor anyone on his behalf regarding that person's making of an independent expenditure on behalf of the candidate, slate, or committee prior to the time the independent expenditure is made. . . .

The 1995 version of Ky. Rev. Stat. § 121.150(1) is reprinted in full at Pet. App. 105-06.

Ky. Rev. Stat. § 121.015(6), in pertinent part, defined "contribution" as any:

> (e) Expenditure in connection with any other activity undertaken independently of the activities of a candidate, slate of candidates, committee, or contributing organization made or furnished for the purpose of influencing the results of an election.

The 1995 version of Ky. Rev. Stat. § 121.015(6)(e) is reprinted at Pet. App. 105.

Ky. Rev. Stat. § 121.015(10), which provides the mens rea applicable to criminal violations of Kentucky's campaign finance laws, provides that:

> "Knowingly" means, with respect to conduct or to a circumstance described by a statute defining an offense, that a person is aware or should have been aware that his conduct is of that nature or that the circumstance exists.

The 1995 version of Ky. Rev. Stat. § 121.015(10) is reprinted at Pet. App. 105.

STATEMENT OF THE CASE

The Kentucky Supreme Court held that four citizens who were politically active in the 1995 Kentucky election for governor must stand trial for alleged violations of overly broad Kentucky campaign finance laws. The Kentucky Supreme Court, in affirming the Kentucky Court of Appeals' reversal of the Franklin Circuit Court's dismissal of the Indictments issued three years after the 1995 election, squarely held that the statutes defining "contribution" and "independent expenditure" were unconstitutionally overbroad under the First Amendment. Nevertheless, the Kentucky Supreme Court permitted the prosecution to proceed by supplying a wholesale re-writing of the statutes under the guise of applying a limiting construction. The Kentucky Supreme Court's decision fundamentally misunderstands a court's power to construe statutes in order to save their constitutionality and retroactively apply that

construction, in violation of established precedent of this Court.

Statement of Facts

This case arises out of the 1995 election for Governor of Kentucky. It is a criminal prosecution under Kentucky's campaign finance laws of the campaign manager for the successful candidate (current Governor Paul E. Patton), along with a coordinator of the Union get-out-the-vote (GOTV) effort and two Union leaders for coordinating the Union GOTV effort with the campaign. This case provides a chilling example of how the application of overbroad prohibitions in campaign finance reform legislation can result in violation of the First Amendment rights of citizens to participate in the political process. As a result of this prosecution, the electoral process in Kentucky has been transformed into a minefield of potential criminal liability that chills participation in elections and violates the First Amendment.

The 1995 election that gave rise to these charges was the first election conducted under Kentucky's public financing law, in which partial public financing was granted to both major campaigns in exchange for their promise to limit expenditures. *See* Ky. Rev. Stat. Ch. 121A. A Special Grand Jury, after over 2 years of highly publicized investigation, charged these four Petitioners, who all openly worked for the election of the Democratic ticket in 1995, with campaign finance violations in the form of alleged coordination between the Union GOTV effort and Governor Patton's campaign. The Special Grand Jury, on September 24, 1998, issued a five count Indictment against Petitioner Andrew Martin (the Governor's campaign

manager, and now his chief-of-staff), Petitioner Danny Ross (a leader of the Union GOTV effort during the campaign and now Labor Liaison for the Governor), and Petitioners Lon Fields and Robert Winstead (Union leaders who supported the GOTV effort, and later received gubernatorial appointments to state boards or commissions). Pet. App. 107-110.

Four of the five counts of the Indictment turn directly on the theory that the Union salary paid to Ross should be considered to be an illegal "contribution" because of the alleged coordination between the Union and the campaign. Pet. App. 107-110. The fifth count of the Indictment charges that Martin and Ross violated the $500 limit on campaign contributions by arranging for the Kentucky Democratic Party to pay the costs of a campaign "fly-around" involving the Governor and the national Secretary-Treasurer of the AFL-CIO on the weekend prior to the election. Pet. App. 109. Even though the Kentucky Democratic Party publicly reported this expenditure to the Federal Election Commission, the Kentucky Attorney General alleges it was a felony for the Party to make this expenditure in support of its own nominee for Governor because it was not made directly to the Patton campaign and reported as a "contribution" to the official committee of the Patton campaign. Pet. App. 109.

It is critical to note the Indictment does NOT allege that Petitioners conducted any campaign activities *other than* communicating with Union members about the Union endorsed candidate in the Fall election. Pet. App. 107-09. Accordingly, the question raised by the Indictment is whether payment of a Union salary to a Union member to work in the Union GOTV effort can be considered a "contribution" to the Patton-Henry campaign, rather than

an unregulated and constitutionally protected electioneering activity. The Attorney General's theory is that communications between the leaders of the Union GOTV effort and the Patton-Henry campaign effectively convert that expenditure from an unregulated independent expenditure into an illegal "contribution." Of course, under federal campaign law, such communications are completely exempt from regulation. *See* 2 U.S.C. § 441b(b)(2).[1]

Each count of the Indictment is premised on the unconstitutionally vague and overbroad definition of "contribution" set forth in Ky. Rev. Stat. § 121.015(6) and § 121.150(1). *See* Pet. App. 107-110. The Kentucky General Assembly *repealed* the overbroad definition of "contribution" set forth in Ky. Rev. Stat. § 121.015(6)(e) in 1996 and substantially narrowed the definition of "independent expenditure" with its companion prohibition against coordination between a campaign and its independent supporters in Ky. Rev. Stat. § 121.150(1)[2] after pre-enforcement litigation by Kentucky Right to Life and a Republic gubernatorial candidate. *See Gable v. Patton*, 142 F.3d 940 (6th Cir. 1998); *Kentucky Right to Life v. Terry*, 108 F.3d 637 (6th Cir. 1997). Nonetheless, the Kentucky Attorney General continues to seek to prosecute this case under the overly broad and now repealed version of the campaign finance law that was in effect during the 1995 campaign.

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[1] "For purposes of this section, the terms 'contribution or expenditure' . . . shall not include (a) communications . . . by a labor organization to its members and their families on any subject."

[2] 1996 Ky. Acts. Ch. 153 §§ 3(1), 4(6), 4(12).

The Proceedings Below

Petitioners were indicted by the Special Grand Jury empanelled by the Franklin Circuit Court on September 28, 1998. Petitioners filed a motion to dismiss the Indictment, contending that the definitions of "contribution," "independent expenditure," and "knowingly" in the statutes in effect during the 1995 gubernatorial election were not sufficiently narrowly tailored to pass muster under the First Amendment. The trial court concluded these definitions "are all constitutionally infirm." Pet. App. 102. Discussing *Buckley v. Valeo*, 424 U.S. 1 (1976) (per curiam), the trial court held that the definition of "contribution" and "independent expenditure" sweep into their ambit too much "political activity protected the First Amendment and are therefore unconstitutionally overbroad." Pet. App. 102.

The trial court also concluded that the definition of "knowingly" set forth in KRS 121.015(10) is "unconstitutionally vague" because it permits a person to be prosecuted for political activity if that person "should have been aware" that his political activity violated one of the proscriptions set forth in Ky. Rev. Stat. Ch. 121. Since the Indictment simply used the word "knowingly," the trial court concluded the vagueness of this statutory definition was an alternate basis for dismissing the Indictment. Pet. App. 103.

A sharply-divided Kentucky Court of Appeals reinstated the Indictment, in a two-to-one decision. The majority invoked the State's compelling interest in preventing the perception of quid pro quo corruption, but totally failed even to inquire whether the means chosen to advance that interest were sufficiently narrowly tailored

to restrict as little core speech as necessary to advance that interest. Pet. App. 91-92. The dissent highlighted the majority's failure even to apply the most narrowly-tailored means test, and correctly concluded the 1995 statutes proscribed too much constitutionally protected speech and were therefore overly broad. Pet. App. 99.

The Kentucky Supreme Court granted discretionary review and affirmed the Court of Appeals. The state Supreme Court held that though the Commonwealth had asserted a sufficiently compelling state interest, it was clear that the statutes were overly broad. The definition of "contribution" in Ky. Rev. Stat. § 121.015(6)(e) directly contravened *Buckley* by "defining as a 'contribution' exactly the type of 'independent expenditure' that *Buckley* held was subject to the closest scrutiny." Pet. App. 23. Furthermore, "the exact wording of the definition of 'contribution' potentially criminalizes the very act of an independent speaker calling a candidate's headquarters to inquire about the candidate's position on an issue" prior to making an independent expenditure, a result clearly outside the bounds of permissible regulation under the First Amendment. Pet. App. 23. Thus, 1995 definition of "independent expenditure", is "neither narrowly tailored nor closely drawn to meet the governmental interests at issue and is, therefore, unconstitutional as written." *Id.*

However, invoking the general rule of statutory construction that a court has a duty to construe a statute to avoid constitutional infirmity, the Kentucky Supreme Court applied a so-called limiting construction in order to limit the operation of "consultation" in the definition of "contribution" to " 'consultation with a . . . candidate, slate of candidates . . . or agent regarding the content, timing, place, nature or volume of the communication for which

the expenditure is made.'" Pet. App. 31-32 (quoting from *Federal Election Commission v. Christian Coalition*, 52 F. Supp.2d 45, 92 (D. D.C. 1999). In other words, rather than construing the actual language in the statutes at issue, the Kentucky Supreme Court added a substantial amount of language to the definitions of "contribution" and "independent expenditure" in order to render them acceptable under the First Amendment.

The state Supreme Court frankly acknowledged that "no amount of narrowing can cure the constitutional infirmities present in KRS 121.015(6)(e) and KRS 121.150(1)(c)." Pet. App. 33-34. Although those sections of the statute *defined* "contribution" and set forth the prohibition against coordinated expenditures that gave rise to this prosecution, the Court held that those definitions were severable from the campaign finance reform statute. Pet. App. 36.

The Kentucky Supreme Court went on to hold that its wholesale judicial re-construction of the definition of "independent expenditure" in Ky. Rev. Stat. § 121.150(1) may be retroactively applied to Petitioners, supposing that Petitioners would have had sufficient notice of this construction in 1995 even though the new language added to the definition was taken from a federal district court case from the District of Columbia issued in 1999. Pet. App. 36-38. The Kentucky Supreme Court reinstated the Indictment, leaving Petitioners to now face a lengthy criminal trial, and possible imprisonment, based on the newly-construed statute.

REASONS FOR GRANTING THE WRIT

I. The Kentucky Supreme Court's decision is in conflict with this Court's precedent concerning application of a limiting construction to an obviously unconstitutional statute.

This Court has long recognized the tension between the duty to apply a limiting construction in order to avoid striking down an act of a legislature for unconstitutionality and the duty to avoid invading the province of the legislative branch of government. Recognizing that tension, this Court has repeatedly held that a court shall not wholly rewrite a statute in order to save it – a court must construe the language as enacted by a legislature:

> It must be remembered that although this Court will often strain to construe legislation so as to save it against constitutional attack, it must not and will not carry this to the point of perverting the purpose of a statute . . . or judicially rewriting it. To put the matter another way, this Court will not consider the abstract question of whether [a legislative body] might have enacted a valid statute but instead must ask whether the statute that [the legislative body] did enact will permissibly bear a construction rendering it free from constitutional defects.

Aptheker v. Secretary of State, 378 U.S. 500, 515 (1964) (internal citations and quotation marks omitted). Accordingly, "[w]e have observed before that such interpretative canons are not a license for the judiciary to rewrite language enacted by the legislature." *United States v. Monsanto*, 491 U.S. 600, 611 (1989) (internal citations and quotation marks omitted); *see also Heckler, Sec'y of Health and Human Services v. Matthews*, 465 U.S 728, 741 (1984)

("The canon favoring constructions of statutes to avoid constitutional questions does not, however, license a court to usurp the policymaking and legislative functions of duly-elected representatives.").

This rule applies with special force in First Amendment cases. *See Virginia v. American Booksellers Association*, 484 U.S. 383, 397 (1988) ("It has long been a tenet of First Amendment law that in determining a facial challenge to a statute, if it be readily susceptible to a limiting construction that would make it constitutional, it will be upheld. The key to application of this principle is that the statute must be 'readily susceptible' to the limitation; we will not rewrite a state law to conform it to constitutional requirements") (internal citations omitted).

Ignoring this long line of cases, the Kentucky Supreme Court substantially re-wrote Ky. Rev. Stat. § 121.150(1) in order to save the Indictments against Petitioners. Rather than construing the language as it was written and enacted by the Kentucky General Assembly:

> [I]ndependent expenditure means one made for a communication which expressly advocates the election or defeat of a clearly identified candidate or slate of candidates . . . and which is not made with any direct or indirect cooperation, consent, request, suggestion, or consultation involving a candidate, slate of candidates, . . . or agent;

the Kentucky Supreme Court added an entire sentence to the statute in order to save its constitutionality:

> [I]ndependent expenditure means one made for a communication which expressly advocates the election or defeat of a clearly identified candidate or slate of candidates . . . and which is not made

> with any direct or indirect cooperation, consent, request, suggestion, or consultation involving a candidate, slate of candidates, . . . or agent **regarding the content, timing, place, nature or volume of the communication for which the expenditure is made**.

Pet. App. 31-32 (emphasis added).

The Kentucky Supreme Court readily admitted this statute was unconstitutionally overbroad under the First Amendment without the addition of the bolded portion above:

> Nevertheless, the objectionable provisions, as written, cannot survive the close scrutiny required by *Buckley*. First, as Appellants point out, KRS 121.015(6)(e) "directly contravened *Buckley* by defining as a 'contribution' exactly the type of 'independent expenditure' that *Buckley* held was subject to the closest scrutiny. . . . Since KRS 121.150(1)(a) (as dissected) defines a contribution as, *inter alia*, 'other than an independent expenditure,' the definition affects not only independent expenditures, but also the limitations on contributions in KRS 121.150(1). It is neither narrowly tailored nor closely drawn to meet the governmental interests at issue and is, therefore, **unconstitutional as written**."

Pet. App. 22-23 (emphasis added).

Thus, when construed as written, the Kentucky Supreme Court squarely held that that unambiguous language of Ky. Rev. Stat. § 121.150(1) was unconstitutional and yet still upheld the validity of the Indictment issued under the unconstitutional statute. This result

cannot be squared with *Aptheker*, *Monsanto*, *American Booksellers Association*, and *Heckler*.

The Kentucky Supreme Court's attempt to construe Ky. Rev. Stat. § 121.150(1) in order to save its constitutionality flies directly in the face of well-established and important precedent of this Court. This Court should grant certiorari in order to correct this blatant misinterpretation of its clear precedent.

II. The Kentucky Supreme Court's decision is in conflict with this Court's precedent concerning retroactive application of an overly broad statute saved from unconstitutionality by a limiting construction.

The Kentucky Supreme Court acted contrary to this Court's precedent in *Dombrowski v. Pfister*, 380 U.S. 479 (1965) and *Osborne v. Ohio*, 495 U.S. 103 (1990) in holding that the statute, as newly construed, could be applied retroactively to Petitioners' conduct in 1995.

This Court stated in *Dombrowski* that a limiting construction may constitutionally be applied to conduct that occurred prior to announcement of the limiting construction in a criminal case only if the application of the limiting construction provided fair warning to the defendants. *See* 380 U.S. at 491 n.7. Otherwise, a prosecution would violate the Ex Post Facto Clause of the U.S. Constitution. This Court went on to elucidate that principle in *Osborne*. In *Osborne*, the Ohio Supreme Court has construed that state's child pornography statute to include only possession of nude photographs meeting the standard announced in prior precedent of this Court. 495 U.S. at 113. On appeal, this Court held that it was constitutionally

permissible to apply that construction retroactively because *Osborne* would have had notice that such conduct was illegal based on the pre-existing precedent of this Court. *Osborne* would "not have been surprised to learn that possession of the four photographs at issue . . . constituted a crime" at the time the conduct occurred. 495 U.S. at 116.

Petitioners, on the other hand, were not given fair warning in 1995 that the Kentucky Supreme Court would re-write the law in 2003. There was no settled law defining the amount of coordination necessary to convert an independent expenditure to a contribution at the time that Petitioners engaged in conduct alleged in the Indictment. In fact, the first coherent pronouncement on this issue occurred four years later in *Federal Election Commission v. Christian Coalition*, 52 F. Supp.2d 45 (D. D.C. 1999). In that case, the Federal District Court for the District of Columbia, noting that *Buckley* had left the issue of the amount and type of coordination necessary to convert an ostensible independent expenditure into a contribution open, *see* 52 F. Supp.2d at 85, rendered a voluminous opinion evaluating the competing theories concerning coordination. The district court eventually settled on the formulation adopted later by the Kentucky Supreme Court in its opinion in this case. The *Christian Coalition* court applied the new formulation prospectively only. *See* 52 F. Supp.2d at 92. The Federal Election Commission acquiesced in that opinion and did not appeal, thus adopting the Christian Coalition standard at the federal level.

This 1999 district court case was the first time the new coordination standard had ever been articulated. Yet, the Kentucky Supreme Court held that it was appropriate to prosecute Petitioners for conduct that occurred four

years before the Federal District Court for the District of Columbia rendered that opinion. In so holding, the Kentucky Supreme Court cited, among other cases, *Dombrowsksi, Osborne* and *Chaplinsky v. New Hampshire*, 315 U.S. 568 (1942). Though it is clear that *Dombrowski* and *Osborne* do not support the court's conclusion, its citation of *Chaplinsky* is even more troubling.

Chaplinsky is, of course, the famous case in which this Court announced the "fighting words" exception to the First Amendment. This Court held that Chaplinsky could be prosecuted under the New Hampshire statute prohibiting so-called fighting words. However, in that case, this Court did not announce a new narrowing construction when it affirmed Chaplinsky's conviction. Fighting words statutes had previously been upheld in *Cantwell v. Connecticut*, 310 U.S. 296 (1940), and the New Hampshire Supreme Court had narrowly construed its statute prior to Chaplinsky's prosecution to acquiesce in *Cantwell*.

Accordingly, this Court said:

> We do not have here the problem of *Lanzetta v. New Jersey*, 306 U.S. 451 (1939). Even if the interpretative gloss placed on the statute by the court below be disregarded, the statute had been previously construed as intended to preserve the public peace by punishing conduct, the direct tendency of which was to provoke the person against whom it was directed to acts of violence. *State v. Brown*, 68 N.H. 200, 38A. 731 (1894). Appellant need not therefore have been a prophet to understand what the statute condemned.
>
> 315 U.S. at 574, n.8.

Accord Broadrick v. Oklahoma, 413 U.S. 601 (1973) ("The consequence of our departure from traditional rules of standing in the First Amendment area [i.e., over-breadth] is that any enforcement of a statute thus placed at issue is totally forbidden **until and unless** a limiting construction or partial invalidation so narrows it as to remove the seeming threat or deterrence to constitutionally protected expression.").

Chaplinsky had fair warning that his conduct was prosecuted because the limiting construction applied to his conduct had been announced before the conduct occurred. Here, Petitioners' conduct occurred a full four years before this particular limiting construction was first announced. There is no reasonable argument that Petitioners would have been afforded due notice of the substance of that opinion in 1995, given the nonexistent case law on the subject prior to the *Christian Coalition* case. A prosecution in this case would violate the principle of fair notice announced in *Dombrowski*, *Osborne* and *Chaplinsky* and would violate the Ex Post Facto Clause of the U.S. Constitution.

The Kentucky Supreme Court's application of *Dombrowski* and *Osborne* is a misapplication of this Court's precedent. This Court should grant certiorari in order to correct the misapplication of these important cases to Petitioners.

III. The Kentucky Supreme Court's decision raises significant questions concerning the application of campaign finance laws to core political speech.

This Court has long recognized that the constitutional protection for freedom of speech "has its fullest and most urgent application precisely to the conduct of campaigns for political office." *Brown v. Hartlage*, 456 U.S. 45, 53 (1982). In *Buckley*, 424 U.S. at 14, this Court held that "contribution and expenditure limitations operate in an area of the most fundamental First Amendment activities." The prosecution of these four citizens for their participation in the political process, based on the allegation that communications between a political campaign and a Union converted the salary of a Union GOTV worker from an unregulated independent expenditure to a criminal act, implicates the most fundamental Freedoms protected by the First Amendment. This Court has never addressed what amount of coordination is necessary to turn protected political speech into a criminal act.

In *United States v. Congress of Industrial Organizations,* 335 U.S. 106 (1948), this Court addressed the constitutionality of the part of the 1947 Taft-Hartley Act which prohibited labor unions from making a "contribution or expenditure in connection with any [federal] election. . . ." *Id.* at 108 n.1. A unanimous Supreme Court agreed the statute infringed on First Amendment freedoms if it applied to Union communications with their members. Five Justices narrowed the statute by construing it to be inapplicable to communications with Union members. Four Justices held the prohibition against "any expenditure in connection with any election" was not narrowly tailored to pass scrutiny under the First

Amendment. The dismissal of the Indictment was affirmed unanimously. There can be no doubt that the First Amendment protects the partisan electoral activities, including the Union GOTV work engaged in by Ross.

This Court has further squarely held that "allowing [unions and corporations] to communicate freely with members and shareholders on any subject" by using their general treasuries – without being limited to "hard money" contributions that are regulated under state and federal law for *external* political activity – was "required by sound policy *and the Constitution.*" *Pipefitters Local 502 v. United States,* 407 U.S. 385, 431 (1972). A Union's partisan political activity in the electoral process is "an archetype of an expressive association" protected by the First Amendment. *Kidwell v. Transportation Communications International Union,* 946 F.2d 283, 301 (4th Cir. 1991). This Court has firmly established that a restriction on the right to pay individuals to promote a group's political agenda in an election "trenches upon an area in which the First Amendment's protection is 'at its zenith.'" *Meyer v. Grant,* 486 U.S. 414, 425 (1988).

The Kentucky Supreme Court's decision ignored this long line of precedent and allows this prosecution to proceed in the belief that a jury may decide whether the communications between the Union and the campaign are so extensive as to convert the salary of the Union GOTV worker from an unregulated expenditure to a felony. However, neither the Kentucky Supreme Court nor the Kentucky statute provides any guidelines or objective criteria as to how to decide when the line has been crossed between an unregulated Union GOTV effort directed at Union members, and a felony of coordinating an expenditure

with a campaign, converting the unregulated expenditure into an illegal "contribution."

The Court held in both *Buckley* and *Federal Election Commission v. Colorado Republican Party*, 533 U.S. 431 (2001) that an expenditure coordinated between a campaign and its independent supporters can be regulated as a "contribution." *Buckley,* 424 U.S. at 46-47*; Colorado Republican Party,* 533 U.S. at 446. However, neither case involved a concrete example of a so-called "coordinated expenditure," and both left the definition of "coordination" for a future case. *See Federal Election Commission v. Christian Coalition,* 52 F. Supp.2d 45, 85 (D. D.C. 1999) (*Buckley* "left this issue for another case."). Since that time, the Federal Election Commission and the states have struggled with defining the issue of coordination.

The Federal Election Commission's efforts culminated with the *Christian Coalition* case. In that case, the agency brought an enforcement action alleging illegal coordination in a number of instances involving the Christian Coalition and its endorsed political candidates. The district court for the District of Columbia rejected the Federal Election Commission's sweeping theories of coordination based on theories adapted from the rules barring "insider trading" in the securities regulation field. The court held that "First Amendment clarity demands a definition of 'coordination' that provides *the clearest possible guidance.*" 52 F. Supp.2d at 91 (emphasis supplied). The court then rejected almost all of the agency's claims of illegal coordination. Rather than appeal the District Court decision, the Federal Election Commission promulgated an administrative regulation defining "coordination" that closely followed the decision in *Christian Coalition. See* 11 C.F.R. Sec. 100.23(c).

Those regulations have now been superceded by the enactment of the Bipartisan Campaign Reform Act of 2002 (BCRA), Section 214(b) and (c), and those regulations are presently being challenged before a special three judge panel of the U.S. District Court for the District of Columbia in the case of *McConnell v. Federal Election Commission*,[3] U.S. District Court, District of Columbia, Civil Action No. 02-582. BCRA provides for expedited review by this Court. *See* P.L. 107-155, Section 402(a)(4).[4] This Court will soon be facing the important issues raised by Petitioners' prosecution in the *McConnell v. Federal Election Commission* matter.

Back in 1995, as these petitioners were engaging in their effort to support the candidate of their choice in the gubernatorial election, none of that guidance was available. Federal law had provided for over 50 years that Union GOTV efforts were exempt from regulation, and were not considered to be "contributions" to a campaign. Kentucky law in 1995 contained an overly broad prohibition against coordinated activity, but the statutes did not define terms

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[3] U.S. Senator Mitch McConnell (R-Ky.), lead plaintiff in *McConnell v. Federal Election Commission,* filed an *amicus curiae* brief in the Kentucky Supreme Court in support of Petitioners, requesting that the court dismiss the Indictment on First Amendment grounds, even though Sen. McConnell is the leader of the Republican Party in Kentucky and the Indictment was brought against prominent members of the Democratic Party, including two who serve the incumbent Democratic Governor as Chief of Staff and Labor Liaison. *See* Sen. McConnell's Motion to File Amicus Curiae brief, Pet. App. 112-115.

[4] "It shall be the duty of the United States District Court for the District of Columbia and the Supreme Court of the United States to advance on the docket and to expedite to the greatest possible extent the disposition of the action and appeal."

such as "suggestion," "request," "consultation," or "cooperation."

In *Buckley,* this Court held that expenditures that "expressively advocate the election or defeat of a clearly identified candidate" could be regulated consistent with the First Amendment, but that the government cannot constitutionally limit the dollar amount of an independent expenditure, even if it contains express advocacy. 424 U.S. at 42.

Following the decision of this Court in *Buckley*, the Kentucky legislature attempted to address the change in the law required by the *Buckley* decision, but it got it backward. The legislature *exempted* a narrowly drawn category of "independent expenditures" from campaign finance reporting requirements, but it exempted only those independent expenditures which expressly advocate the election or defeat of a clearly identified candidate. *See* 1980 Ky. Acts Ch. 292 § 6(1); *cf.* 2 U.S.C. § 434(c)(1). This amendment profoundly misunderstood the express advocacy test erected in *Buckley*. The phrase "expressly advocate the election or defeat of a clearly identified candidate" applies to what may be required to be reported, not what may be excepted from the reporting requirement. The 1980 Kentucky legislature effectively inverted the holding in *Buckley*, creating the confusion that led to the Indictment of Petitioners.

The 1980 Act excepted from the reporting requirement only those advertisements which expressly advocate the election or defeat of a clearly identified candidate, while requiring a candidate's supporters to report all other expenditures as "contributions" through the candidate's official committee. This results in subjecting all such

political spending to the limits on the dollar amount of a direct contribution. Consequently, whether by sloppy drafting or excessive reformist zeal, the 1980 Amendment required supporters to report precisely the kind of independent expenditures which *Buckley* held cannot be constitutionally regulated; conversely, it subjected independent expenditures which *Buckley* held cannot be constitutionally limited in amount, to the dollar limits of direct contributions to a campaign! These provisions remained in the statutes during the 1995 gubernatorial campaign, and they form the underlying foundation for this Indictment.

Compounding this error, the 1992 Kentucky legislature added further, and equally unconstitutional, limitations on independent expenditures. KRS 121.150(1) was amended to add the following:

> No candidate, slate of candidates, campaign committee . . . nor anyone acting on their behalf **shall have any communication** with another person nor anyone acting on his behalf **regarding that person's making of an independent expenditure** . . . prior to the time the independent expenditure is made.

1992 Ky. Acts Ch. 288 § 25 (emphasis supplied). Never before in history has a similar criminal prosecution been brought alleging that the mere communication between a political campaign and an independent GOTV effort, can result in converting the salary of a GOTV worker from an unregulated expenditure to a felony. Yet that is exactly what this Indictment alleges.

Moreover, the constitutional danger of this overly broad criminal prohibition is compounded by the equally

unconstitutional scope of the *mens rea* requirement under Kentucky law as it applies to political activities with First Amendment implications. The Kentucky campaign finance statute allows for a criminal conviction under a simple negligence standard, with a mere showing that the defendant "should have known" his conduct was prohibited. Ky. Rev. Stat. § 120.015(10). Because the statutory definition of "knowingly" explicitly encompasses a negligence standard, it falls far short of the bright line test required by *Buckley*. 424 U.S. at 39-51.

This case implicates our most fundamental freedom in this country – that of political speech. Accordingly, this Court should accept review of this case, and correct the decision of the Kentucky Supreme Court.

CONCLUSION

For the foregoing reasons, the Petition for a Writ of Certiorari should be granted.

Respectfully submitted,

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Supreme Court of Kentucky

2000-SC-1101-DG
AND
2001-SC-0675-DG

ANDREW J. MARTIN; DANNY ROSS; LON FIELDS; AND ROBERT WINSTEAD	APELLANT/ CROSS-APPELLEES

ON REVIEW AND CROSS-REVIEW
FROM COURT OF APPEALS
1999-CA-1367
FRANKLIN CIRCUIT COURT
98-CR-136-1, 98-CR-136-2,
98-CR-136-3 & 98-CR-136-4

V.

COMMONWEALTH OF KENTUCKY	APPELLEE/ CROSS-APPELLANT

OPINION OF THE COURT BY JUSTICE COOPER

AFFIRMING

This concludes the second chapter of this protracted investigation and prosecution of alleged election campaign finance law violations during the 1995 Kentucky gubernatorial election campaign. In chapter one, we upheld the authority of the grand jury to investigate and return indictments for such violations. *Democratic Party of Kentucky v. Graham*, Ky., 976 S.W.2d 423 (1998). Today, we hold that the statutes under which Appellants now stand indicted are neither unconstitutional as applied nor unconstitutionality vague or overbroad. Whether the alleged

conduct of Appellants falls within the coverage of those provisions must await chapter three, for there is no summary judgment procedure in a criminal case in Kentucky. *Commonwealth v. Hayden*, Ky., 489 S.W.2d 513, 516 (1972); *Commonwealth v. Hay*, Ky. App., 987 S.W.2d 792, 794-95 (1998); *Commonwealth v. Hamilton*, Ky. App., 905 S.W.2d 83, 84 (1995).

I. THE STATUTES.

In 1995, the relevant provisions of KRS chapters 121 and 121A provided in pertinent part as follows (words, phrases and provisions deemed by Appellants to render the statutes unconstitutional are designated in boldface print):

KRS 121.015(6):

"Contribution" means any:

(a) Payment, distribution, loan, deposit, or gift of money or other thing of value, to a candidate, his agent, a slate of candidates, its authorized agent, a committee, or contributing organization . . . ;

(b) Payment by any person other than the candidate, his authorized treasurer, a slate of candidates, a committee, or a contributing organization, of compensation for the personal services of another person which are rendered to a candidate, slate of candidates, committee, or contributing organization . . . ;

(c) Goods, advertising, or services with a value of more than one hundred dollars ($100) in the aggregate in any one (1) election which are furnished to a candidate, slate of candidates,

committee, or contributing organization . . . without charge, or at a rate which is less than the rate normally charged for the goods or services;

. . .

(e) Expenditure in connection with any other activity undertaken independently of the activities of a candidate, slate of candidates, committee, or contributing organization made or furnished for the purpose of influencing the results of an election;[1]

KRS 121.015(7):

Notwithstanding the foregoing meanings of "contribution," the word shall not be construed to include:

(a) Services provided without compensation by individuals volunteering a portion or all of their time on behalf of a candidate, committee, or contributing organization;

. . .

KRS 121.150(1):[2]

(a) No contribution of money or other thing of value, nor obligation therefor, shall be made or

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[1] This subsection was deleted by the 1996 General Assembly. 1996 Ky. Acts, ch. 153, § 4.

[2] This provision contained four separate and distinct sub-provisions that were not separately enumerated. We have taken the liberty of dissecting the provision and designating those sub-provisions as (a), (b), (c) and (d) for purposes of clarity and analysis.

received, and no expenditure of money or other thing of value shall be made or incurred, **directly or indirectly**, other than an "independent expenditure," . . . to support or defeat a candidate [or] slate of candidates . ., except through the duly appointed campaign manager, or campaign treasurer of the candidate [or] slate of candidates. . . .

(b) As used in this section, "independent expenditure" means one made for a communication which expressly advocates the election or defeat of a clearly identified candidate or slate of candidates . . . and which is not made with any **direct or indirect** cooperation, consent, request, suggestion, or **consultation involving a candidate**, slate of candidates, . . or agent.[3]

(c) No candidate, slate of candidates, campaign committee, political issues committee, nor anyone acting on their behalf shall have **any communication** with another person nor anyone on his behalf regarding that person's making of an independent expenditure on behalf of the

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[3] In 1996, this definition was deleted from KRS 121.150(1), recompiled as KRS 121.015(12), and amended to read as follows: " 'Independent expenditure' means the expenditure of money or other things of value for a communication which expressly advocates the election or defeat of a clearly identified candidate or slate of candidates, and which is made without any coordination, consultation or cooperation with any candidate, slate of candidates, campaign committee, or any authorized person acting on behalf of any of them, and which is not made *in concert with or at the request or suggestion of* any candidate, slate of candidates, campaign committee, or any authorized person acting on behalf of any of them." 1996 Ky. Acts, ch. 153 §§ 3, 4 (emphasis added).

candidate [or] slate . . . prior to the time the independent expenditure is made.[4]

(d) Any person making an "independent expenditure," as defined in this subsection, shall report these expenditures when the expenditures exceed five hundred dollars ($500) in the aggregate in any one (1) election on a form provided by the registry and shall sign a statement on the form, under penalty of perjury, that the expenditure was an actual independent expenditure and that there was no prior communication with the campaign on whose behalf it was made.

KRS 121.150(12):

No person shall make a payment, distribution, loan, advance, deposit, or gift of money to another person to contribute to a candidate, committee, contributing organization, or anyone on their behalf. No candidate, committee, contributing organization, nor anyone on their behalf shall accept a contribution made by one (1) person who has received a payment, distribution, loan, advance, deposit or gift of money from another person to contribute to a candidate, committee, contributing organization, or anyone on their behalf.

KRS 121.056(1):

No person who contributes more than the maximum legal contribution established by KRS

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[4] This provision was added to KRS 121.150(1) by the 1994 General Assembly and deleted therefrom by the 1996 General Assembly. 1994 Ky. Acts, ch. 458, § 8; 1996 Ky. Acts, ch. 153, § 3.

121A.050 in any one (1) election to a slate of candidates for Governor and Lieutenant Governor that is elected to office shall hold any appointive state office or position, which shall be made by gubernatorial appointment, during the term of office following the campaign in which the contribution shall be made.

KRS 121A.050(1):

. . . Except for independent expenditures, as defined in KRS 121.150(1), no natural person . . . shall **knowingly** make a contribution of more than five hundred dollars ($500) in any one (1) election to a slate of candidates that has filed a statement of intent to accept transfers from the fund and abide by the maximum expenditure limit . . . .

KRS 121.990(3):

Any person who **knowingly** violates any of the provisions of . . . [KRS] 121.150 to 121.230 . . . or KRS Chapter 121A, shall, for each offense, be guilty of a Class D felony.

KRS 121.015(10):

"Knowingly" means, with respect to conduct or to a circumstance described by a statute defining an offense, that a person **is aware or should have been aware** that his conduct is of that nature or that the circumstance exists.

II. THE INDICTMENT.

In 1995, Lieutenant Governor Paul Patton and Dr. Stephen Henry were, respectively, the Democratic candidates for governor and lieutenant governor of Kentucky.

Because the slate filed a statement of intent to accept partial public financing of its campaign, it was required to limit its campaign expenditures to a total of $1,800,000, of which $600,000 would be raised by campaign contributions to the slate and $1,200,000 would be paid to the slate by the publicly financed election campaign fund. KRS 121A.030(1); KRS 121A.080(1). Appellant Andrew Martin was the slate's campaign manager. Appellant Danny Ross was a full-time state employee working as a "labor liaison" in Lieutenant Governor Patton's office. Appellant Lon Fields was the president of Local 89 of the General Drivers, Warehousemen and Helpers Union ("Teamsters") and secretary-treasurer of Joint Council 94, the local Teamsters political action committee (PAC). Appellant Robert Winstead was secretary/treasurer of Local 89 and recording secretary of Joint Council 94.

On July 18, 1995, Ross resigned his position as the lieutenant governor's "labor liaison" and commenced employment with Joint Council 94 as a "labor coordinator." He was hired to work through December 12, 1995, at a total salary of $20,000, to be paid one-half by Joint Council 94 and one-half by the International Brotherhood of Teamsters' Democratic Republican Independent Voter Education Committee (IBT DRIVE), the Teamsters' national PAC. On August 1, 1995, IBT DRIVE forwarded its check for $10,000 to Joint Council 94 as "reimbursement for ½ of Danny Ross salary." Joint Council 94 subsequently assigned Ross to work as a "political liaison" for AFL-CIO locals in Kentucky. Joint Council 94, however, continued to pay Ross's salary. On November 9, 1995, two days after the general election (won by the Patton/Henry slate), Ross resigned his employment with Joint Council 94 and returned to his former position in Lieutenant

Governor Patton's office. Shortly after taking office as governor, Patton appointed Fields to the Kentucky Racing Commission, a position that gives him access to such perquisites as box seats at the Kentucky Derby, and appointed Winstead to the Kentucky Occupational Safety and Health Review Commission, a position that pays him $19,400 per year (in addition to the pay he receives from his regular employment).

The Commonwealth alleges that Ross's real job from July 18 to November 9, 1995, was that of full-time labor coordinator for the Patton/Henry campaign and that Fields and Winstead, at the instigation of Martin and Ross, induced the Teamsters PACs to pay Ross's salary so that the slate would not have to deduct it from the $1,800,000 maximum expenditure limit permitted by KRS 121A.030(1), *i.e.,* money not paid to Ross was money that could be used for, *e.g.,* television advertisements. In essence, the theory of the indictment is that the payment of Ross's $20,000 salary and/or the in-kind loan of Ross's services to the campaign[5] (either alone or in complicity with others) was but a disguised contribution to the slate made in violation of KRS 121.150(1) (Count I – a contribution not paid to the campaign manager or treasurer), KRS

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[5] *Federal Election Comm'n v. National Rifle Ass'n of America,* 254 F.3d 173, 183-87 (D.C. Cir. 2001) (use of employees of not-for-profit association in candidate's campaign was a "contribution"); *California Med. Ass'n v. Federal Election Comm'n,* 641 F.2d 619, 630 (9th Cir.1980) (value of administrative services donated to campaign was a "contribution"), *aff'd* 453 U.S. 182, 101 S.Ct. 2712, 69 L.Ed.2d 567 (1981); *Federal Election Comm'n v. Friends of Jane Harman,* 59 F.Supp.2d 1046, 1057 (C.D. Cal. 1999) (services provided by corporate employees at campaign's fundraiser constituted a "contribution").

121.150(12) (Count II – a payment made to another to contribute to the campaign), and KRS 121A.050(1) (Count V – a contribution in excess of $500). Count III of the indictment charges that Appellants solicited and obtained the gubernatorial appointments for Fields and Winstead as rewards for their successful efforts to induce the Teamsters PACs to pay the salary of a campaign employee and/or to arrange for the in-kind loan of Ross's services, and that their appointments were, therefore, obtained in violation of KRS 121.056(1).

According to the bill of particulars, Count IV of the indictment pertains to three separate incidents involving only Martin and/or Ross that are alleged to constitute violations of KRS 121.150(1). The first incident occurred in early November 1995 and involved an expenditure by the National Council for Senior Citizens PAC, a political action committee affiliated with the AFL-CIO. The Commonwealth alleges that the PAC contacted Clarence Frost, a PAC director for the national AFL-CIO, and advised him that it wanted to spend $10,000 on Patton/Henry radio advertisements. Frost is alleged to have called Martin to obtain assistance in writing the advertisements, and Martin is alleged to have directed Frost to the Patton/Henry slate's advertising firm. Frost called the advertising firm and requested that two advertisements be drafted. The firm drafted the advertisements and allegedly forwarded them to Patton/Henry campaign headquarters in Louisville which then faxed the advertisements to Frost who delivered them to the PAC. The PAC expended a total of $8,197.34 on the advertisements which it reported as an "independent expenditure." The Commonwealth claims the expenditure was an illegal "contribution" because the expenditure was made with "direct or indirect cooperation

. . . or consultation" with Martin and was not paid through the slate's campaign manager or treasurer.

The second incident occurred on November 4, 1995, when a Mr. and Mrs. Boyer allegedly informed Patton/Henry campaign workers of their desire to contribute $5,000 to the campaign. The Commonwealth claims the Boyers, at Martin's direction, delivered to Martin two checks for $2,500 each payable to the Kentucky Democratic Party. Martin caused the checks to be delivered to Democratic Headquarters which reported them as contributions to the Democratic Party. The Commonwealth alleges that, in reality, the Boyer money was spent that same day on Patton/Henry advertisements at the request or suggestion of, or in consultation with, Martin; thus, the Commonwealth asserts, the purchases of the advertisements were not independent expenditures by the Democratic Party but were illegal contributions made to the Patton/Henry slate at Martin's instigation.

The third incident pertains to the so-called "Trumka fly-around" on November 5, 1995. The Commonwealth alleges that Martin and Ross arranged for Richard Trumka, former president of the United Mine Workers of America and recently elected secretary-treasurer of the AFL-CIO, to accompany Patton and labor union dignitaries on a chartered flight to various political rallies attended primarily by union members. Although Patton was the only Democratic candidate to participate in the fly-around, its cost, $3,878.62, was paid by the Kentucky Democratic Party Executive Committee. The Commonwealth contends this was not an independent expenditure by the Democratic Party but an illegal contribution made at the request or suggestion of, or in consultation with, Martin and Ross on behalf of the Patton/Henry slate.

The trial judge dismissed the indictment because he believed that the definitions of "contribution" and "independent expenditure" in the 1995 versions of KRS 121.015(6) and KRS 121.150(1) were unconstitutionally overbroad in that those provisions "do not permit political activity protected by the First Amendment;" and that the definition of "knowingly" in KRS 121.015(10) was unconstitutionally vague because "no specific intent by the Defendants is required by the statute to prove any criminal conduct on behalf of the Defendants." A split panel of the Court of Appeals disagreed and reversed and remanded for further proceedings. We granted discretionary review and now affirm the Court of Appeals.

III. *BUCKLEY V. VALEO*.

Any First Amendment analysis of Kentucky's Campaign Finance Regulation Act, KRS chapter 121, and Public Financing Campaign Act, KRS chapter 121A, necessarily begins with *Buckley v. Valeo,* 424 U.S. 1, 96 S.Ct. 612, 46 L.Ed.2d 659 (1976) (per curiam), the United States Supreme Court's seminal opinion construing similar provisions in the Federal Election Campaign Act of 1971 (FECA),[6] as amended in 1974.[7] *See Nixon v. Shrink Missouri Government PAC,* 528 U.S. 377, 382, 120 S.Ct. 897, 901, 145 L.Ed.2d 886 (2000) ("We hold *Buckley* to be authority for comparable state regulation, which need not be pegged to *Buckley*'s dollars."). The 1974 FECA amendments provided for partial public financing of federal

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[6] Pub.L. No. 92-225, 86 Stat. 3.

[7] Pub.L. No. 93-443, 88 Stat. 1263; 1 U.S.C. § 431, *et seq.*

elections and limitations on campaign contributions and expenditures. They also established the Federal Election Commission to enforce compliance with those provisions. These amendments were enacted largely in reaction to the "Watergate" scandal and the large sums of money raised and spent by President Nixon's 1972 re-election campaign. *See* Jennifer A. Moore, Note, *Campaign Finance Reform in Kentucky: The Race for Governor,* 85 Ky. L.J. 723, 728 (1996-97), *citing* Robert E. Mutch, *Campaigns, Congress, and Courts: The Making of Federal Campaign Finance Law* 47-49 (1988) *and* Herbert E. Alexander, *Financing Politics: Money, Elections, and Political Reform* 1, 20 (4th ed. 1992). Similarly, the 1992 amendments of KRS chapter 121 and enactment of KRS chapter 121A, adopting similar reforms, were largely in reaction to the so-called "BOP-TROT" scandal and the large sums of money spent during the 1987 and 1991 gubernatorial campaigns. Moore, *supra,* at 723-25.

Although the United States Supreme Court has addressed campaign finance issues in a number of cases since *Buckley,* those decisions have mostly involved applications of *Buckley* to variations on facts and issues. *E.g., Federal Election Comm'n v. Colorado Republican Federal Campaign Comm.* ("*Colorado II*"), 533 U.S. 431, 121 S.Ct. 2351, 150 L.Ed.2d 461 (2001) (applying *Buckley* to expenditures by political parties); *Federal Election Comm'n v. Massachusetts Citizens for Life, Inc.,* 479 U.S. 238, 107 S.Ct. 616, 93 L.Ed.2d 539 (1986) (applying *Buckley* to expenditures by non-profit corporations); *Federal Election Comm'n v. National Conservative Political Action Comm.,* 470 U.S. 480, 105 S.Ct. 1459, 84 L.Ed.2d 455 (1985) (applying *Buckley* to expenditures by political action committees); *California Med. Ass'n v. Federal Election Comm'n,* 453 U.S.

182, 101 S.Ct. 2712, 69 L.Ed.2d 567 (1981) (applying *Buckley* to expenditures by individuals and associations). Accordingly, our task is to apply *Buckley* to the facts and issues giving rise to these indictments. Those aspects of *Buckley* dealing with campaign finance matters not at issue in this case, *e.g.*, limitations on total campaign expenditures, limitations on expenditures by a candidate from personal funds, reporting and disclosure requirements, etc., need not be addressed.

At the outset, *Buckley* held that restrictions on contributions and expenditures implicate the First Amendment freedoms of speech and association, 424 U.S. at 16-25, 96 S.Ct. at 633-37, and rejected an argument that such limitations were merely expressive conduct akin to burning a draft card and, therefore, subject to "*O'Brien* intermediate scrutiny for communicative action." *Shrink Missouri, supra,* at 386, 120 S.Ct. at 903, *citing United States v. O'Brien,* 391 U.S. 367, 88 S.Ct. 1673, 20 L.Ed.2d 672 (1968). Similarly, *Buckley* confirmed that FECA's ceilings on expenditures and contributions could not be sustained merely as reasonable "time, place, and manner" restrictions. *Buckley, supra,* at 17-18, 96 S.Ct. at 634. FECA's ceilings, it held, "impose[d] direct quantity restrictions on political communication and association . . . in addition to any reasonable time, place, and manner restrictions otherwise imposed." *Id.*

However, though holding that limitations on both expenditures and contributions implicate First Amendment interests, *Buckley* found that the levels of constitutional infringement accompanying each subject of regulation differed. Limitations on "expenditures," or the amount one may independently spend in favor of a political position or candidate, constitute a direct and substantial

limitation on political speech. *Buckley, supra,* at 19, 96 S.Ct. at 634-35.

> A restriction on the amount of money a person or group can spend on political communication during a campaign necessarily reduces the quantity of expression by restricting the number of issues discussed, the depth of their exploration, and the size of the audience reached. This is because virtually every means of communicating ideas in today's mass society requires the expenditure of money.

Id.

Limitations on "contributions," or the amount that one may contribute to a candidate or political committee, however, were found to create only a "marginal restriction" on the contributor's First Amendment rights, *id.* at 20-21, 96 S.Ct. at 635, because a contribution does little more than communicate "a general expression of support for a candidate and his views," through "the symbolic act of contributing." *Id.* at 21, 96 S.Ct. at 635. The First Amendment interest primarily implicated by a contribution is the right of political association. *Id.* at 24-25, 96 S.Ct. at 637. This expression of association is not affected by the amount or size of the contribution which, at best, conveys "a very rough index of the intensity of the contributor's support for the candidate." *Id.* at 21, 96 S.Ct. at 635-636. As a matter of necessity, "the transformation of contributions into political debate involves speech by someone other than the contributor." *Id.* at 21, 96 S.Ct. at 636. Thus, limitations on contributions (not amounting to a ban) do not pose a great threat to political speech.

Importantly, *Buckley* also noted that contributions may come clothed as expenditures. "The expenditure of

resources at the candidate's direction," *Buckley* found, was for First Amendment purposes no different than a direct monetary contribution. *Id.* at 36-37, 96 S.Ct. 612. Therefore, *Buckley* approved FECA's treatment of prearranged or coordinated expenditures as "contributions." *Id.* at 46-47 and n.53, 96 S.Ct. at 647-48 and n.53. *See also Colorado II, supra,* at 440-42, 121 S.Ct. at 2358-59. Only truly "independent expenditures" differ functionally from cash gifts for purposes of the First Amendment. *Id.* Buckley also upheld the inclusion of "in-kind assistance" within the definition of a "contribution" because it "provides material financial assistance to a candidate." *Id.* at 36, 96 S.Ct. at 643.

> The ultimate effect is the same as if the person had contributed the dollar amount to the candidate and the candidate had then used the contribution to pay for [*e.g.*] the fundraising event or the food. . . . Treating these expenses as contributions when made to the candidate's campaign or at the direction of the candidate or his staff forecloses an avenue of abuse without limiting actions voluntarily undertaken by citizens independently of a candidate's campaign.

Id. at 36-37, 96 S.Ct. at 643. Thus, whether a contributor offers a cash gift or supplies in-kind assistance or advertisements in coordination with the candidate, governmental limitations on such contributions impact the First Amendment in only a "marginal" way. *Id.* at 20-21, 96 S.Ct. at 635.

Accordingly, *Buckley* and its progeny have established that limitations on truly independent expenditures must be "narrowly tailored" to serve a "compelling" governmental interest, while limitations on contributions need only

be "closely drawn" to match a "sufficiently important" governmental interest. *Buckley, supra,* at 24-25, 44-45, 96 S.Ct. at 637-38, 647; *Shrink Missouri, supra,* at 386-88 and n.3, 120 S.Ct. at 903-05 and n.3. *See also Beaumont v. Federal Election Comm'n,* 278 F.3d 261, 271 (4th Cir. 2002); *Daggett v. Commission on Governmental Ethics and Election Practices,* 205 F.3d 445, 454, 464 (1st Cir. 2000); *Service Employees Int'l Union v. Fair Political Practices Comm'n,* 955 F.2d 1312, 1322 (9th Cir. 1992); *Opinion of the Justices to the House of Representatives,* 637 N.E.2d 213, 216 (1994).

Buckley concluded that there was a compelling and sufficiently important governmental interest in preventing corruption and the appearance of corruption arising from the real or imagined coercive influence of large financial contributions on candidates' positions and on their conduct if elected to office, especially *quid pro quo* arrangements between contributors and potential office holders that undermine the integrity of representative democracy. *Id.* at 25-29, 96 S.Ct. at 638-39. Thus, the only question was whether FECA's limitations were sufficiently tailored for purposes of the First Amendment to meet that interest.

The $1,000 limitation on contributions in former 18 U.S.C. § 618(b)[8] easily met this test. The Court found that it was closely drawn because it focused precisely on the problem to be solved – potential corruption related to large campaign contributions – but otherwise did not substantially affect opportunities to engage in independent political

[8] Repealed, Pub.L. No. 94-283, Title II, § 201(b), 90 Stat. 496 (1976). Now *see* 2 U.S.C. § 441a.

expression and association or undermine to any material degree "the potential for robust and effective discussion of candidates and campaign issues by individual citizens, associations, the institutional press, candidates, and political parties." *Id.* at 28-29, 96 S.Ct. at 639-40.

However, a different result was required with respect to the $1,000 limitation on "independent expenditures" in former 18 U.S.C. § 608(e)(1).[9] As noted, this restriction required subjection to the highest scrutiny. The Court's analysis proceeded in two main steps. First, former § 608(e)(1) was subject to a vagueness analysis pursuant to *NAACP v. Button,* 371 U.S. 415, 83 S.Ct. 328, 9 L.Ed.2d 405 (1963), which requires that Congress regulate in the area of the First Amendment "only with narrow specificity." *Id.* at 418, 83 S.Ct. at 338. As written, former § 608(e)(1) literally prohibited all individuals from making expenditures in excess of $1,000 "relative to a clearly identified candidate." *Buckley, supra,* at 39-40, 96 S.Ct. at 644-45. The phrase "relative to" was held too indefinite in that it "fail[ed] to clearly mark the boundary between permissible and impermissible speech. . . ." *Id.* at 41, 96 S.Ct. at 645. Therefore, *Buckley* construed that language as applying "only to expenditures for communications that in express terms advocate the election or defeat of a clearly identified candidate," *id.* at 44, 96 S.Ct. at 646-47, otherwise referred to as "express advocacy." *Massachusetts Citizens for Life, supra,* 479 U.S. at 249, 107 S.Ct. at 623. In addition to avoiding the vagueness challenge, this interpretation attempted to make former § 608(e)(1) as

[9] Repealed, Pub.L. No. 94-283, Title II, § 201(a), 90 Stat. 496 (1976).

constitutionally palatable as possible by leaving unregulated "funds spent [independently] to propagate one's views on issues without expressly calling for a candidate's election or defeat," *Buckley, supra,* at 44, 96 S.Ct. at 646 (quotation omitted), otherwise referred to as "issue advocacy." *Massachusetts Citizens for Life, supra* at 252 n.6, 107 S.Ct. at 625 n.6.

Nevertheless, even narrowed to cover only express advocacy, former 18 U.S.C. § 608(e)(1) was held to be unconstitutionally overbroad. Most importantly, *Buckley* found that independent expenditures for express advocacy posed little danger of real or apparent corruption. 424 U.S. at 46, 96 S.Ct. at 648. The fact that coordinated expenditures were treated as "contributions" by FECA alleviated much of the concern that corrupt donors would mask their contributions as expenditures. *Id.* at 47, 96 S.Ct. at 648.

> The absence of prearrangement and coordination of an expenditure with the candidate or his agent . . . alleviates the danger that expenditures will be given as a *quid pro quo* for improper commitments from the candidate. Rather than preventing circumvention of the contribution limitations, § 608(e)(1) severely restricts all independent advocacy despite its substantially diminished potential for abuse.

Id.

Thus, in the discussions most relevant to this case, *Buckley* upheld FECA's limits on contributions, but struck down FECA's limits on truly independent expenditures. As the Court has recently noted, "[l]ater cases have respected this line between contributing and spending." *Colorado II, supra,* 533 U.S. at 437, 121 S.Ct. at 2356.

IV. "AS APPLIED."

Appellants attack the constitutionality of the 1995 version of our campaign finance laws both "as applied" and as "facially overbroad." Generally, a person to whom a statute may constitutionally be applied cannot challenge it on the ground that it may conceivably be applied unconstitutionally to others in other situations not before the Court. *Broadrick v. Oklahoma,* 413 U.S. 601, 610, 93 S.Ct. 2908, 2915, 37 L.Ed.2d 830 (1973). However, there is an exception with respect to statutes restricting First Amendment rights. *Id.* at 612, 93 S.Ct. at 2916 (*citing Dombrowski v. Pfister,* 380 U.S. 479, 486, 85 S.Ct. 1116, 1121, 31 L.Ed.2d 22 (1965)). That is "because of a judicial prediction or assumption that the statute's very existence may cause others not before the court to refrain from constitutionally protected speech or expression." *Broadrick, supra,* at 612, 93 S.Ct. at 2916. *Dombrowski* referred to this as a "chilling effect upon the exercise of First Amendment rights." 380 U.S. at 487, 85 S.Ct. at 1121.

There is general agreement that the "as-applied" issue should be addressed first, for if the statute is unconstitutional as applied, there is no need to address the more complicated issue of "facial overbreadth."

> [T]he overbreadth question is ordinarily more difficult to resolve than the as-applied, since it requires determination whether the statute's overreach is *substantial,* not only as an absolute matter, but "judged in relation to the statute's plainly legitimate sweep," *Broadrick v. Oklahoma, supra,* at 615, 93 S.Ct., at 2917, and therefore requires consideration of many more applications than those immediately before the court. Thus, for reasons relating both to the

> proper functioning of courts and to their efficiency, the lawfulness of the particular application of the law should ordinarily be decided first.

Board of Trustees of State Univ. of New York v. Fox, 492 U.S. 469, 485, 109 S.Ct. 3028, 3037, 106 L.Ed.2d 388 (1989) (emphasis in original). Thus, ordinarily, we would first undertake a comprehensive "as applied" analysis of the constitutionally objectionable provisions.

However, Appellants' "as applied" challenge can be dismissed simply because the provisions of which they complain are not being applied to them. The primary First Amendment violations claimed by Appellants are that (1) KRS 121.015(6)(e) included within the definition of "contribution" exactly the type of independent activity that *Buckley* held could not be restricted; (2) the definition of "independent expenditure," KRS 121.150(1)(b) (as dissected), required the expenditure to be made without "consultation involving a ... candidate," which could include, *e.g.,* a consultation with a third party about the candidate or a mere inquiry of the candidate as to his/her position on a particular issue for the purpose of determining whether to make an independent expenditure; and (3) KRS 121.150(1)(c) (as dissected) prohibited "any communication" between the campaign and a potential independent spender about the expenditure before the expenditure was made. We agree that these provisions were facially unconstitutional for precisely the reasons stated by Appellants.

Nevertheless, the bases for Appellants' attack on these provisions are inapposite to the conduct charged in the indictment. First, Appellants are not even charged under KRS 121.015(6)(e). Second, although Appellants are charged under KRS 121.150(1), the language of which they complain in KRS 121.150(1)(b) (as dissected) is irrelevant

to their allegedly criminal conduct. Appellants were indicted for making contributions (as principals or accomplices) in the form of "coordinated" expenditures to the Patton/Henry slate other than through the slate's campaign manager or treasurer. The indictment (as defined by the bill of particulars) does not allege that the expenditures were contributions because they were made *e.g.*, after consultation with a third party about the candidate or a mere inquiry as to the candidate's position on a particular issue. Instead, the indictment alleges that the expenditures were contributions because the details as to content, timing, place, nature, or volume of the communications for which the expenditures were made were coordinated with agents of the Patton/Henry slate. Finally, the expansive reference to "any communication" in KRS 121.150(1)(c) (as dissected) is also irrelevant to the indictment. Appellants were not indicted for "communicati[ng] with another person or anyone on his/her behalf regarding that person's making of an independent expenditure." KRS 121.150(1)(c) (as dissected). They were indicted for making contributions (as principals or accomplices) to a slate of candidates other than through the slate's campaign manager or treasurer. KRS 121.150(1)(a) (as dissected).

Thus, although the above three provisions, all of which were either repealed or amended in 1996,[10] were either wholly or partially facially unconstitutional, as discussed in more detail *infra*, those unconstitutional aspects are not being applied to Appellants.

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[10] See notes 1, 3 and 4, *supra*.

V. OVERBREADTH.

A. Facial Overbreadth.

As noted in the preceding "as applied" analysis, we agree that KRS 121.015(e), KRS 121.150(1)(b) (as dissected), and KRS 121.150(1)(c) (as dissected) are all constitutionally infirm for essentially the reasons asserted by Appellants.

The importance of the governmental interest is not at issue here. Appellants do not suggest that Kentucky's election finance statutes do not serve a compelling or "sufficiently important" governmental interest in the prevention of corruption and the appearance of corruption. *See Kentucky Right to Life, Inc. v. Terry,* 108 F.3d 637, 639 (6th Cir. 1997) ("Numerous Kentucky public officials have been convicted of abusing their political offices for personal gain over the past twenty-five years. To address this serious problem, the Kentucky General Assembly passed the Campaign Finance Law. . . .").[11]

Nevertheless, the objectionable provisions, as written, cannot survive the close scrutiny required by *Buckley.*

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[11] Appellants also do not challenge the $500 limitation on contributions established by KRS 121A.050(1) for the 1995 gubernatorial campaign. The Patton/Henry slate agreed to that limitation when it filed its statement of intent to accept partial public financing. That agreement, however, does not affect Appellants' constitutional challenges to KRS 121.015, KRS 121.150, and KRS 121.990, which apply to all election campaigns, not just those that are publicly funded. It should be noted that KRS 121.150(6) also applied the $500 (now $1,000) limitation to all candidates (except school board candidates) whose campaigns were not publicly funded. That statute was upheld against a First Amendment challenge in *Kentucky Right to Life, Inc. v. Terry, supra,* at 648.

First, as Appellants point out, KRS 121.015(6)(e) directly contravened *Buckley* by defining as a "contribution" exactly the type of "independent expenditure" that *Buckley* held was subject to the closest scrutiny.

Second, KRS 121.150(1)(b) (as dissected) facially defined "independent expenditure" as, in part, an expenditure "not made ... with any consultation involving a candidate." As Appellants point out, this definition would preclude a person who intended to post a billboard as an "independent expenditure" from discussing the merits of the candidate with his third-party neighbor. Moreover, the potential speaker could not even call the candidate's headquarters to inquire as to the candidate's position on a particular issue. Since KRS 121.150(1)(a) (as dissected) defines a contribution as, *inter alia,* "other than an 'independent expenditure,'" the definition affects not only independent expenditures, but also the limitations on contributions in KRS 121.150(1). It is neither narrowly tailored nor closely drawn to meet the governmental interests at issue and is, therefore, unconstitutional as written.

The prohibition in KRS 121.150(1)(c) (as dissected) of "any communication" between the campaign and the potential independent spender about the expenditure before the expenditure was made is even more seriously flawed. The hard core purpose of KRS 121.150(1) is not to prohibit "communications" but to prohibit "contributions" not made through the candidate's or slate's campaign manager or campaign treasurer. The existence or absence of a communication between a potential spender and a candidate, slate, or agent thereof is relevant only to whether an expenditure is a contribution or an independent expenditure. However, KRS 121.150(1)(c) (as dissected) prohibited the communication, itself, an even worse First Amendment

violation than the "no contact" rule in 11 C.F.R. § 114.4(c)(5) that was struck down in *Clifton v. Federal Election Comm'n,* 114 F.3d 1309 (1st Cir. 1997). "[W]e think it is beyond reasonable belief that, to prevent corruption or illicit coordination, the government could prohibit voluntary discussions between citizens and their legislators and candidates on public issues." *Id.* at 1314.

B. Mootness.

The Commonwealth asserts that the 1996 repeal of KRS 121.015(6)(e) and KRS 121.150(1)(c) (as dissected), and the amendment of the definition of "independent expenditure" to narrow its scope, moots Appellants' overbreadth challenge because those statutes are no longer "chilling" the exercise of anyone's First Amendment rights. This argument was embraced by a panel of the Sixth Circuit Court of Appeals in *Kentucky Right to Life, Inc. v. Terry, supra,* at 644-45, which premised its decision on what we conclude was an incorrect interpretation of *Massachusetts v. Oakes,* 491 U.S. 576, 109 S.Ct. 2633, 105 L.Ed.2d 493 (1989). *Terry,* 108 F.3d at 644. The Commonwealth and the Sixth Circuit's opinion rely on Justice O'Connor's plurality opinion in *Oakes.* 491 U.S. at 582-84, 109 S.Ct. at 2637-39. However, that opinion was joined by only three other members of the Court with respect to that issue. The separate opinions of Justice Scalia (joined by Blackmun, J.) and Justice Brennan (joined by Marshall and Stevens, JJ.) both would have held that an intervening repeal of a facially overbroad statute does not moot an overbreadth challenge by one who stands convicted under the statute. *Id.* at 585-88, 591 n.1, 109 S.Ct. at 2639-40, 2642 n.1.

> I join Part I of Justice Scalia's opinion holding that a defendant's overbreadth challenge cannot

> be rendered moot by narrowing the statute after the conduct for which he has been indicted occurred – the only proposition to which five Members of the Court have subscribed in this case.

Id. at 591 n.1, 109 S.Ct. at 2642 n.1 (Brennan, J. dissenting). Although the five votes fragmented between the concurring and dissenting opinions in *Oakes* cannot be characterized as a "holding" for purposes of *stare decisis, Gregg v. Georgia,* 428 U.S. 153, 169 n.15, 96 S.Ct. 2909, 2923 n.15, 49 L.Ed.2d 859 (1976) ("the holding of the Court may be viewed as that position taken by those members who concurred in the judgment on the narrowest grounds"), we find the reasoning supporting those five votes persuasive. *See especially* Justice Scalia's analysis of *Bigelow v. Virginia,* 421 U.S. 809, 95 S.Ct. 2222, 44 L.Ed.2d 600 (1975). *Oakes, supra,* at 587 n.1, 109 S.Ct. at 2640 n.1. We conclude that Appellants' overbreadth challenge is not precluded by the mootness doctrine.

C. Advisory Opinion Mechanism.

The Commonwealth asserts that the advisory opinion mechanism in KRS 121.135, especially the "safe harbor" provision in KRS 121.135(4)(b), effectively eliminates any claim of facial overbreadth. KRS 121.135(4)(b) provides:

> Notwithstanding any other provision of law, any person or committee to whom a written advisory opinion has been rendered who relies upon any provision or finding of the advisory opinion and who acts in good faith in accordance with the provisions and findings of an advisory opinion shall not, as a result of any act with respect to a transaction or activity addressed by the advisory

> opinion, be subject to any sanction provided by this chapter. . . .

This issue was also raised in *Buckley* as a defense to a vagueness challenge, but was rejected because, at that time, the FECA advisory opinion statute, 2 U.S.C. § 437f (1970 ed., Supp. IV), afforded the right to request advisory opinions only to candidates, federal officeholders, and political committees. *Buckley,* 424 U.S. at 40 n.47, 96 S.Ct. at 645 n.47. As the Commonwealth points out, KRS 121.135(1) contains no such restriction. In further support of its position, the Commonwealth cites the following language in *Martin Tractor Co. v. Federal Election Comm'n,* 627 F.2d 375 (D.C. Cir. 1980), a pre-enforcement challenge to the application of certain FECA provisions:

> [T]o the extent that it offers a prompt means of resolving doubts with respect to the statute's reach, the advisory opinion (AO) mechanism written into the FECA, under which the Commission is authorized to give advice concerning the Act's application to specific factual situations, mitigates whatever chill may be induced by the statute and argues against constitutional adjudication on a barren record.
>
> . . .
>
> When a means like this one is available to reduce uncertainty or narrow the statute's reach and that means can be pursued at little risk to the rights asserted, the chill induced by facial vagueness *or overbreadth* is *pro tanto* reduced.

Id. at 384-86 (emphasis added).

Although the above quotation refers to "overbreadth," *Martin Tractor,* like *Buckley,* was, in fact, considering the

effect of the advisory opinion mechanism on a claim of vagueness. 627 F.2d at 384. Regardless, we cannot agree that the advisory opinion mechanism cures or even *pro tanto* reduces the degree of overbreadth that existed in KRS 121.015(6)(e) and KRS 121.150(1)(c) (as dissected). The advisory opinion mechanism, as applied to these provisions, would have been resigned to continually interpreting an unconstitutional statute. All an advisory opinion could say with respect to, *e.g.*, whether a prospective expenditure would constitute a "contribution" under KRS 121.015(6)(e) is essentially "yes" or "no." If "no," the expenditure would be afforded a "safe harbor," and no enforcement or punitive action could be taken. But if "yes," then the otherwise valid conduct would be "chilled," and the overbreadth issue would still remain.

D. Limiting Construction.

"When a . . . court is dealing with a . . . statute challenged as overbroad, it should, of course, construe the statute to avoid constitutional problems, if the statute is subject to such a limiting construction." *New York v. Ferber,* 458 U.S. 747, 769 n.24, 102 S.Ct. 3348, 3361 n.24, 73 L.Ed.2d 1113 (1982). "Facial overbreadth has not been invoked when a limiting construction has been or could be placed on the challenged statute." *Broadrick v. Oklahoma, supra,* at 613, 93 S.Ct. at 2916. *See also Massachusetts Citizens for Life, Inc., supra,* 479 U.S. at 248-49, 107 S.Ct. at 623 (construing the definition of "expenditure" in 2 U.S.C. § 432(9)(A) to mean "expenditure for express advocacy"); *Buckley, supra,* 424 U.S. at 41-44, 96 S.Ct. at 645-47 (attempting to mute a vagueness challenge by construing the phrase "expenditure . . . relative to a clearly

identified candidate" to mean "expenditure . . . advocating the election or defeat of a clearly identified candidate").

Appellants suggest that the process of upholding constitutionality by a limiting construction is precluded by the statement in Justice Brennan's dissent in *Oakes, supra,* at 591 n.1, 109 S.Ct. at 2642 n.1, that "a defendant's overbreadth challenge cannot be rendered moot by narrowing the statute after the conduct for which he has been indicted occurred." *Id.* at 591 n.1, 109 S.Ct. at 2642. The distinction, of course, is that mootness is a procedural device that precludes consideration of the substance of a statute. The substance of a statute includes not only its words but the judicial construction placed on those words.

Indeed, in its very next term after rendering *Oakes,* the United States Supreme Court addressed precisely this argument in *Osborne v. Ohio,* 495 U.S. 103, 110 S.Ct. 1691, 109 L.Ed.2d 98 (1990). There, the challenged Ohio statute facially purported to prohibit the possession of "nude" photographs of minors, apparently contravening the Supreme Court's holding in *Erznoznik v. City of Jacksonville,* 422 U.S. 205, 213, 95 S.Ct. 2268, 2274, 45 L.Ed.2d 125 (1975), that depictions of nudity, without more, constitute protected expression. The Ohio Supreme Court narrowly construed the statute to prohibit "the possession or viewing of material or performance of a minor who is in a state of nudity, where such nudity constitutes a lewd exhibition or involves a graphic focus on the genitals, and where the person depicted is neither the child nor the ward of the person charged." 495 U.S. at 113, 110 S.Ct. at 1698.

> Osborne contends that it was impermissible for the Ohio Supreme Court to apply its construction of § 2907.323(A)(3) to him – *i.e.,* to rely

> on the narrowed construction of the statute when evaluating his overbreadth claim. Our cases, however, have long held that a statute as construed "may be applied to conduct occurring prior to the construction, provided such application affords fair warning to the defendan[t]."

Id. at 115, 110 S.Ct. at 1699 (*quoting Dombrowski v. Pfister, supra,* at 491 n.7, 85 S.Ct. at 1123 n.7).

The Court then determined that Osborne had fair warning of the narrowed construction because (1) it was obvious from the face of the statute that its goal was to eradicate child pornography and (2) the material in Osborne's possession consisted of photographs of adolescent boys in sexually explicit situations. "Therefore, although § 2907.323(A)(3) as written may have been imprecise at its fringes, someone in Osborne's position would not be surprised to learn that his possession of the four photographs at issue in this case constituted a crime." 495 U.S. at 116, 110 S.Ct. at 1700. *See also Hamling v. United States,* 418 U.S. 87, 94 S.Ct. 2887, 41 L.Ed.2d 590 (1974), construing a statute that proscribed the mailing of "obscene" matter. In *Hamling,* the United States Supreme Court rejected an overbreadth challenge by construing "obscenity," as used in the statute, "to be limited to the sort of 'patently offensive representations or depictions of that specific "hard core" sexual conduct given as examples in *Miller v. California.*'" *Id.* at 114, 94 S.Ct. at 2906.

We do not regard *Musselman v. Commonwealth,* Ky., 705 S.W.2d 476 (1986), or *Hatchett v. City of Glasgow,* Ky., 340 S.W.2d 248 (1960), as being contrary to these mainstream First Amendment precedents. *Hatchett* involved an interpretation of a provision of the T.V.A. Act, KRS 96.550,

et seq., that provides authority and procedures for acquisition by municipalities of privately owned electrical plants. 340 S.W.2d at 251. The T.V.A. Act does not purport to restrict First Amendment rights and has no application to a First Amendment overbreadth challenge. *Musselman* condemned "judicial expansion" of a statute by extending its scope to include conduct that could constitutionally be regulated but which was not within the plain meaning of the statute as written. 705 S.W.2d at 477. On the other hand, a limiting construction, sometimes referred to as "judicial narrowing," limits the scope of a statute by identifying conduct that can constitutionally be regulated and which is clearly within the meaning of the statute as written, thereby excluding, by a process akin to *ejusdem generis,* application of the statute to conduct that cannot constitutionally be regulated. See also our discussion, *infra,* of the "ex post facto/fair warning" issues raised by Appellants.

Among Kentucky precedents, only *Commonwealth v. Foley,* Ky., 798 S.W.2d 947 (1990), can be construed to prohibit the application of a limiting construction to uphold the constitutionality of a facially overbroad statute regulating First Amendment activities. *Id.* at 948-949. *Foley,* however, cited only *Hatchett, supra, Musselman, supra,* and *Coates v. Cincinnati,* 402 U.S. 611, 91 S.Ct. 1686, 29 L.Ed.2d 214 (1971), in support of that prohibition. As discussed above, neither *Hatchett* nor *Musselman* so held. And in declaring unconstitutional a Cincinnati loitering ordinance that prohibited "conduct . . . annoying to persons passing by," the Court in *Coates* noted that the Ohio Supreme Court had not sufficiently narrowed the scope of the ordinance, 402 U.S. at 613, 91 S.Ct. at 1688, and "[w]e are thus relegated, at best, to the words of the

ordinance itself." *Id.* at 614, 91 S.Ct. at 1688. Implicit in the Court's holding was a conclusion that the ordinance would have been upheld if the Ohio Supreme Court had narrowly construed it to apply only to activities that could constitutionally be regulated under the First Amendment. 492 U.S. at 613 n.3, 91 S.Ct. at 1688 n.3 (*citing Chaplinsky v. New Hampshire,* 315 U.S. 568, 62 S.Ct. 766, 86 L.Ed. 1039 (1942), which holds that an otherwise facially overbroad state statute that has been narrowly construed by the highest court of that state to apply only to activities that can constitutionally be regulated is not unconstitutional). Insofar as *Commonwealth v. Foley* can be construed to prohibit a limiting construction of a statute challenged as facially overbroad, we overrule it and follow the mainstream principle of judicial construction exemplified by *Osborne v. Ohio, Federal Election Comm'n v. Massachusetts Citizens for Life, New York v. Ferber, Buckley v. Valeo, Hamling v. United States, Broadrick v. Oklahoma,* and *Chaplinsky v. New Hampshire,* all *supra.* We express no opinion as to whether the provisions of KRS 119.205 that were struck down in *Foley* would have survived constitutional scrutiny even under a limiting construction. *Cf. Buckley, supra,* at 44-51 647-50 (even as narrowly construed, former 18 U.S.C. § 608(e)(1) impermissibly burdened the constitutional right of free expression).

Thus, we avoid invalidating KRS 121.150(1) by narrowly construing the phrase, "consultation involving a . . . candidate, slate of candidates . . . or agent" in the definition of "independent expenditure," KRS 121.150(1)(b) (as dissected), as limited to "consultation with a . . . candidate, slate of candidates . . . or agent regarding the

content, timing, place, nature or volume of the communication for which the expenditure is made." *Cf. Federal Election Commission v. Christian Coalition,* 52 F.Supp.2d 45, 92 (D. D.C. 1999).[12]

Appellants urge us to go further, as did *Christian Coalition,* and require not only that the consultation be about details of the proposed communication, as opposed to, *e.g.,* a mere inquiry into the position of the candidate on a particular issue, but also that the candidate "exercise control over" or engage in "substantial discussion or negotiation" with the potential spender about those specifics. *Id.* However, our polar star, *Buckley v. Valeo, supra,* defined a "contribution" as an expenditure placed in "cooperation with or with the consent of" the candidate, 424 U.S. at 78, 96 S.Ct. at 663, obviously concluding that this definition was "closely drawn to avoid unnecessary abridgment of associational freedoms." *Id.* at 25, 96 S.Ct. at 638. Similarly, the expenditures at issue in *Colorado Republican Campaign Comm. v. Federal Election Comm'n* ("*Colorado I*"), 518 U.S. 604, 116 S.Ct. 2309, 135 L.Ed.2d 795 (1996), were held to be independent expenditures and not contributions because they were "not [made] pursuant to any general or particular understanding with a candidate." *Id.* at 614, 116 S.Ct. at 2315. (In fact, the expenditures at issue in *Colorado I,* were for advertisements opposing the election

[12] The definition fashioned in *Christian Coalition* was intended only to apply to what was termed an "expressive coordinated expenditure," 52 F.Supp.2d at 92, which the Federal Election Commission apparently regards as an expenditure for "a general public communication," *e.g.,* an advertisement. 11 C.F.R. § 100.23. However, those aspects of the definition that we have borrowed from *Christian Coalition* also apply to the type of expenditures alleged to have occurred in this case.

of a Democratic candidate and were made before the Republican candidate had been selected.) FECA defines "independent expenditure" as one made "without cooperation or consultation with" the candidate and "not made in concert or cooperation with, or at the request or suggestion of" the candidate. 2 U.S.C. § 431(17).[13] We conclude that KRS 121.150(1)(b) (as dissected), as above construed, is "sufficiently narrowly tailored," *Austin v. Michigan Chamber of Commerce,* 494 U.S. 652, 660, 110 S.Ct. 1391, 1398, 108 L.Ed.2d 652 (1990), to withstand Appellants' overbreadth challenge.[14] However, no amount of judicial

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[13] The statute was amended, effective November 6, 2002, to add the words "or cooperation." Pub. L. 107-155, Title II § 211. Title IV § 402, 116 Stat. 92, 112 (March 27, 2002).

[14] Appellants insist that "exacting scrutiny," the label sometimes used by *Buckley* to refer to its standard of review, requires a search for "the most narrowly tailored means" of restricting communications. They then extend that argument to a conclusion that the 1996 amendments of KRS chapter 121, which, indeed, further narrowed the restrictions on campaign finance expenditures, conclusively prove that the 1995 version was unconstitutional because it did not employ "the most narrowly tailored means" of restriction, *i.e.,* those reflected by the 1996 amendments. We find this argument akin to an assertion that a statute is facially overbroad if it is possible to conceive of any impermissible application thereof. *See Houston v. Hill,* 482 U.S. 451, 458, 107 S.Ct. 2502, 2508, 96 L.Ed.2d 398 (1987) ("We have never held that a statute should be held invalid merely because it is possible to conceive of a single impermissible application.") (quotation omitted). In fact, "a law should not be invalidated for overbreadth unless it reaches a substantial number of impermissible applications. . . ." *New York v. Ferber, supra,* 458 U.S. at 771, 102 S.Ct. at 3362 (*extending Broadrick v. Oklahoma, supra,* 413 U.S. at 615, 93 S.Ct. at 2917).

> "A substantial overbreadth rule is implicit in the chilling effect rationale . . . [T]he presumption must be that only substantially overbroad laws set up the kind and degree of chill that is judicially cognizable." Moreover, "[without] a substantial overbreadth limitation, review for overbreadth

(Continued on following page)

narrowing can cure the constitutional infirmities present in KRS 121.015(6)(e) and KRS 121.150(1)(c) (as dissected).

E. Severability.

KRS 446.090, entitled "Severability," provides:

> It shall be considered that it is the intent of the General Assembly, in enacting any statute, that if any part of the statute be held unconstitutional the remaining parts shall remain in force, unless the statute provides otherwise, or unless the remaining parts are so essentially and inseparably connected with and dependent upon the unconstitutional part that it is apparent that the General Assembly would not have enacted the remaining parts without the unconstitutional part, or unless

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would be draconian indeed. It is difficult to think of a law that is utterly devoid of potential for unconstitutionality in some conceivable application."

Ferber, 458 U.S. at 772 n.27, 102 S.Ct. at 3362 n.27 (*quoting* Note, *The First Amendment Overbreadth Doctrine,* 83 Harv. L. Rev. 844, 859, and n.61 (1970)). *See also Hendricks v. Commonwealth,* Ky., 865 S.W.2d 332, 337 (1993).

The United States Supreme Court has used the phrase, "most narrowly tailored means," on only one occasion to date, *Norman v. Reed,* 502 U.S. 279, 294, 112 S.Ct. 698, 708, 116 L.Ed.2d 711 (1992), a case challenging the number of signatures that a "new political party" must obtain to acquire ballot access. The phrase was used in an isolated context and nothing in *Norman* suggests an intent to extend or depart from *Buckley* in that respect. For these reasons, we reject Appellants' assertion that exacting scrutiny, or its cousin "strict scrutiny," requires a potentially neverending quest for "the most narrowly tailored means" of restricting campaign expenditures.

> the remaining parts, standing alone, are incomplete and incapable of being executed in accordance with the intent of the General Assembly.

The compiler's notes to this statute explain that this section was originally created in order to obviate the necessity of attaching a severability clause to each act as it is passed.

In *Brockett v. Spokane Arcades, Inc.*, 472 U.S. 491, 105 S.Ct. 2794, 86 L.Ed.2d 394 (1985), a similar severability clause in a state statute was invoked to remove unconstitutional language from a statute and thereby avoid total invalidation because of partial overbreadth. *Id.* at 507, 105 S.Ct. at 2803. Similar to the language in KRS 446.090, *Brockett* noted that "[p]artial invalidation would be improper if it were contrary to legislative intent in the sense that the legislature had passed an inseverable Act or would not have passed it had it known the challenged provision was invalid." *Id.* at 506, 105 S.Ct. at 2802-03. Even without a specific severability statute or clause, courts routinely sever unconstitutional provisions from overbroad statutes. "[I]f the . . . statute is not subject to a narrowing construction and is impermissibly overbroad, it nevertheless should not be stricken down on its face; if it is severable, only the unconstitutional portion is to be invalidated." *New York v. Ferber, supra,* 458 U.S. at 769 n.24, 102 S.Ct. at 3361 n.24 (*citing United States v. Thirty-Seven Photographs,* 402 U.S. 363, 91 S.Ct. 1400, 28 L.Ed.2d 822 (1971)). Thus, in *Buckley v. Valeo, supra,* the Court severed those sections of the statutes that it had declared unconstitutional.

> Unless it is evident that the legislature would not have enacted those provisions which are within its power, independently of that which is

> not, the invalid part may be dropped if what is left is fully operative as a law.

Id. 424 U.S. at 108-09, 96 S.Ct. at 677 (*quoting Champlin Refining Co. v. Corporation Comm'n,* 286 U.S. 210, 234, 52 S.Ct. 559, 565, 76 L.Ed. 1062 (1932)).

We have no difficulty concluding that KRS 121.015(6)(e) and KRS 121.150(1)(c) (as dissected) are severable from the other valid provisions of those statutes. The valid provisions, standing alone, are complete and capable of being executed in accordance with the intent of the General Assembly. Obviously, the valid provisions are not so essentially and inseparably connected with and dependent upon the invalid provisions that the General Assembly would not have enacted the valid provisions without the invalid provisions. Proof positive of the accuracy of that conclusion is the fact that the General Assembly, itself, severed KRS 121.015(6)(e) and KRS 121.150(1)(c) (as dissected) from the statutory scheme in 1996.[15] Thus, we invoke KRS 446.090 and uphold the constitutionality of KRS 121.015(6) and KRS 121.150(1) by severing therefrom KRS 121.015(6)(e) and KRS 121.150(1)(c) (as dissected).

F. Ex Post Facto/Fair Warning.

Appellants contend that the Ex Post Facto Clause, U.S. Const. art. I, § 10, Ky. Const. § 19(1), precludes application of our limiting construction of KRS 121.150(1)'s definition of "independent expenditure" to the indictment against them. We disagree. As noted *supra,* the United States Supreme

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[15] *See* notes 1 and 4, *supra.*

Court explicitly held otherwise in *Osborne v. Ohio, supra,* so long as "'such application affords fair warning to the defendan[t].'" *Id.* at 115, 110 S.Ct. at 1699 (*quoting Dombrowski, supra,* at 491 n.7, 85 S.Ct. at 1123 n.7). *See also Hamling, supra; Tharp v. Commonwealth,* Ky., 40 S.W.3d 356, 362-63 (2000). Appellants' reliance on *Bouie v. City of Columbia,* 378 U.S. 347, 84 S.Ct. 1697, 12 L.Ed.2d 894 (1964), is misplaced. The defendants in *Bouie* were charged with criminal trespass when they refused to leave a retail drug store at which they were conducting a sit-in demonstration. South Carolina's trespass statute, S.C.Code § 16-386 (1952), prohibited *"[e]ntry* on lands of another after notice prohibiting same." (Emphasis added). The South Carolina Supreme Court "construed the statute to cover not only the act of entry on the premises of another after receiving notice not to enter, but also the act of *remaining* on the premises of another after receiving notice to leave." *Bouie,* 378 U.S. at 350, 84 S.Ct. at 1700-01 (emphasis added). Thus, as explained in *Hamling, supra, Bouie* involved an "unforeseeable and retroactive judicial expansion of narrow and precise statutory language," whereas a limiting construction, applied, as here, in response to an overbreadth challenge "add[s] a clarifying gloss" to the statute to make it "more definite" in its application to conduct sought to be restricted. *Hamling,* 418 U.S. at 115-16, 94 S.Ct. at 2907. See also our discussion, *supra,* of limiting construction.

Our construction of the definition of "independent expenditure" in KRS 121.150(1) simply specifies conduct that was already included within the plain language of the statute and excludes any conduct that cannot constitutionally be restricted. Thus, Appellants had "fair warning" of the scope of the valid restrictions in accordance with

Osborne, supra, at 116, 110 S.Ct. at 1700. Indeed, unlike the expansive construction in *Bouie, supra,* our limiting construction restricts the range of conduct that is subject to regulation under KRS 121.150(1)(a) (as dissected). "It is axiomatic that for a law to be *ex post facto* it must be more onerous than the prior law." *Dobbert v. Florida,* 432 U.S. 282, 294, 97 S.Ct. 2290, 2299, 53 L.Ed.2d 344 (1977). *See also Calder v. Bull,* 3 U.S. (3 Dall.) 386, 391, 1 L.Ed. 648 (1798) (No law "that mollifies the rigor of criminal law" is within the prohibition of the Ex Post Facto Clause.).

Appellants' ex post facto challenge to our severance of KRS 121.015(6)(e) and KRS 121.150(1)(c) (as dissected) from the statutes fails for the same reasons. Severing these unconstitutional provisions only "mollifies the rigor" of the law, *Calder, supra,* at 391, and makes it "less onerous." *Dobbert, supra,* at 294, 97 S.Ct. at 2299. In fact, *Dobbert* noted that the "ultimate proof" that the new version of the statute was less onerous than the old was the fact that the old version was unconstitutional. *Id.* at 297, 97 S.Ct. at 2300.

VI. VAGUENESS.

"Due process requires that a criminal statute provide adequate notice to a person of ordinary intelligence that his contemplated conduct is illegal, for 'no man shall be held criminally responsible for conduct which he could not reasonably understand to be proscribed.'" *Buckley v. Valeo, supra,* at 77, 96 S.Ct. at 662 (*quoting United States v. Harriss,* 347 U.S. 612, 617, 74 S.Ct. 808, 812, 98 L.Ed. 989 (1954)). "[T]he void-for-vagueness doctrine requires that a penal statute define the criminal offense with sufficient definiteness that ordinary people can understand what

conduct is prohibited and in a manner that does not encourage arbitrary and discriminatory enforcement." *Kolender v. Lawson,* 461 U.S. 352, 357, 103 S.Ct. 1855, 1858, 75 L.Ed.2d 903 (1983). *See also Foley, supra,* 798 S.W.2d at 951; *Commonwealth v. Kash,* Ky. App., 967 S.W.2d 37, 43 (1997). Moreover, "[b]ecause First Amendment freedoms need breathing space to survive, government may regulate in the area only with narrow specificity." *NAACP v. Button, supra,* 371 U.S. at 418, 83 S.Ct. at 338. However, "speculation about possible vagueness in hypothetical situations not before the Court will not support a facial attack on a statute when it is surely valid in the vast majority of its intended applications." *Hill v. Colorado,* 530 U.S. 703, 733, 120 S.Ct. 2480, 2498, 147 L.Ed.2d 597 (2000) (quotation omitted).

A. "Directly or Indirectly."

Appellants assert that use of the phrase "directly or indirectly" in KRS 121.150(1)(a) (as dissected) and "direct or indirect" in KRS 121.150(1)(b) (as dissected) render those provisions unconstitutionally vague. We disagree. Our very Constitution employs the same language in the context of sanctions for election campaign finance violations:

> [I]f any corporation shall, *directly or indirectly,* offer, promise or give, or shall authorize, *directly or indirectly,* any person to offer, promise or give any money or any thing of value to influence the result of any election in this State, or the vote of any voter authorized to vote therein, . . . such corporation . . . shall, on conviction thereof, forfeit its charter . . . [or] all right to carry on any business in this State. . . .

Ky. Const. § 150 (emphasis added). And in *Fanelli v. Commonwealth,* Ky., 418 S.W.2d 740 (1967), our predecessor Court upheld against a vagueness challenge the provision of KRS 61.190 that provides a penalty for "[a]ny public officer who shall receive, *directly or indirectly,* any interest, profits or perquisites arising from the use or loan of public funds. . . ." *Id.* at 745 (emphasis added).

Nor have the federal courts expressed any constitutional qualms about regulating conduct committed "directly or indirectly."

> Funds provided to a candidate or political party or campaign committee either *directly or indirectly* through an intermediary constitute a contribution.

Buckley v. Valeo, supra, at 23-24 n.24, 96 S.Ct. at 637 n.24 (emphasis added).

> In Part I we . . . construed that term ["contribution"] to include not only contributions made *directly or indirectly* to a candidate, political party, or campaign committee, and contributions made to other organizations or individuals but earmarked for political purposes, but also all expenditures placed in cooperation with or with the consent of a candidate, his agents, or an authorized committee of the candidate.

Id. at 78, 96 S.Ct. at 663 (emphasis added).

In *United States Civil Service Comm'n v. National Ass'n of Letter Carriers, etc.,* 413 U.S. 548, 576-81, 93 S.Ct. 2880, 2896-98, 37 L.Ed.2d 796 (1973), the United States Supreme Court rejected overbreadth and vagueness challenges to Section 9(a) of the "Hatch Act," 5 U.S.C. § 7324(a)2, and its attendant regulations, one of which, 5 C.F.R.

§ 733.121(3), prohibited "*[d]irectly or indirectly* soliciting, receiving, collecting, handling, disbursing, or accounting for assessments, contributions, or other funds for a partisan political purpose." (Emphasis added.) In *Broadrick v. Oklahoma, supra,* the Court also upheld against identical challenges Oklahoma's version of the "Hatch Act," Okla. Stat. Ann., Tit. 74, § 818(5) and (6), which contained the same provisions. 413 U.S. at 618, 93 S.Ct. at 2908. And in *United States v. Goland,* 959 F.2d 1449 (9th Cir. 1992), where the defendant claimed his contributions were "independent expenditures" because the money was not paid *directly* to the campaign but to a political consultant who used the money to produce and broadcast commercials scripted by the contributor and read by the candidate, the Ninth Circuit Court of Appeals held that it was immaterial that the defendant made his illegal contribution "indirectly" as opposed to "directly." *Id.* at 1452.

The use of the phrase, "directly or indirectly," in KRS 121.150(1)(a) (as dissected) gives adequate notice to a person of ordinary intelligence that a contribution to a candidate or state includes, *e.g.,* payment to a third party for the benefit of the candidate or state. We also conclude that use of the phrase, "direct or indirect," in the definition of "independent expenditure" gives adequate notice to a person of ordinary intelligence that the requisite "consent, request, suggestion or consultation" includes, *e.g.,* such a communication made to one acting on behalf of the potential spender, *e.g.,* a request by Martin and/or Ross that Fields and/or Winstead induce the Teamster PACs to pay Ross's salary.

B. "Knowingly."

Appellants assert that statutes that restrict First Amendment freedoms require proof of "intent" as an element of any criminal sanction, thus the *mens rea* of "knowingly" required by KRS 121A.050(1) and KRS 121.990(3) is insufficient. Appellants cite only *Smith v. California,* 361 U.S. 147, 80 S.Ct. 215, 4 L.Ed.2d 205 (1959), for this proposition. However, *Smith* struck down the obscenity ordinance at issue in that case precisely because it did *not* require the *mens rea* element of scienter, *i.e.,* knowledge by the defendant bookseller of the content of the allegedly obscene book. *Id.* at 154-55. And in *New York v. Ferber, supra,* it was held on appeal of a child pornography conviction that "criminal responsibility may not be imposed without some element of scienter on the part of the defendant." 458 U.S. at 765, 102 S.Ct. at 3358. We also note that 2 U.S.C. § 441b(a) makes it unlawful "knowingly to accept or receive" a contribution from a national bank, corporation, or labor organization, and that 2 U.S.C. § 441c(a)(2) makes it unlawful "knowingly to solicit" a contribution from a government contractor. It was held in *Federal Election Comm'n v. Dramesi for Congress Committee,* 640 F.Supp. 985 (D.N.J. 1986), that a " 'knowing' standard, as opposed to a 'knowing and willful' one, does not require knowledge that one is violating a law, but merely requires an intent to act." *Id.* at 987. *See also Federal Election Comm'n v. Friends of Jane Harman, supra,* note 5, at 1056 n.11. We conclude that "knowingly" is a sufficient *mens rea* to support a criminal conviction of violating Kentucky's campaign finance laws.

Appellants next contend that KRS 121.015(10)'s definition of "knowingly" to mean "aware or should have been aware" denies them due process of law because it

authorizes their convictions under a negligence standard. But *Smith v. California, supra,* did not foreclose the possibility that something less than actual knowledge could support a conviction, even under a statute restricting First Amendment rights.

> We need not and most definitely do not pass today on what sort of mental element is requisite to a constitutionally permissible prosecution of a bookseller for carrying an obscene book in stock; . . . whether there might be circumstances under which the State constitutionally might require that a bookseller investigate further, or might put on him the burden of explaining why he did not, and what such circumstances might be.

Id. at 154, 80 S.Ct. at 219.

Subsequent cases have held that actual knowledge is not a prerequisite to conviction under criminal statutes implicating the First Amendment. *E.g., Hamling v. United States, supra,* 418 U.S. at 120, 94 S.Ct. at 2909, rejecting an argument that conviction under an obscenity statute required proof that the defendant "knew or believed that such [material] could be properly or justly characterized as obscene" and holding that the proper inquiry was whether (1) the material was, in fact, obscene and (2) the defendant "knew or had notice" at the time of its content (not whether he knew or believed it was obscene which, of course, would constitute a *mens rea* of "intent"); *Ginsberg v. New York,* 390 U.S. 629, 643-44, 88 S.Ct. 1274, 1283, 20 L. Ed. 2d 195 (1968), rejecting a vagueness challenge to a pornography statute defining "knowingly" as "having general knowledge of, or reason to know, or a belief or ground for belief which warrants further inspection or inquiry. . . ."

Other First Amendment cases upholding similar definitions of "knowingly" include *Newman v. Conover,* 313 F.Supp. 623, 630 (N.D. Tex. 1970) (defining "constructive knowledge" as "knowledge of facts which would put a reasonable and prudent man on notice as to the suspect nature of the material"); *Taylor v. State ex rel. Kirkpatrick,* 529 S.W.2d 692, 694 (Tenn. 1975) (same); *State v. Scott,* 460 S.W.2d 103, 105 (Tex. 1970) (same); *Commonwealth v. Doe,* 462 A.2d 762, 765 (Pa. Super. 1983) ("having general knowledge of or reason to know, or a belief or ground for belief which warrants further inspection or inquiry or both"); *Great Speckled Bird of Atlanta Coop. News Project v. Stynchcombe,* 298 F.Supp. 1291, 1292 (N.D. Ga. 1969) ("reasonably should know"); *State v. Yabe,* 559 P.2d 209, 211 (Ariz. Ct. App. 1977) ("having general knowledge of, or reason to know, or a belief or ground for belief which warrants further inspection or inquiry"); *State v. Burch,* 365 So.2d 1263, 1266 (La. 1978) ("knew or had reason to know"); *Commonwealth v. Rosenberg,* 398 N.E.2d 451, 454-55 (Mass. 1979) ("had seen, or should have seen"). And in *Burns v. State,* 512 S.W.2d 928 (Ark. 1974), the Arkansas Supreme Court upheld a jury instruction defining "knowingly" as "was aware or should have been aware," precisely the language challenged here. *Id.* at 934.

We recognize that the Model Penal Code definition of "knowingly" requires actual knowledge, *Model Penal Code and Commentaries,* Part I, § 2.02 cmt. 2 (A.L.I. 1985), and that the definition of "knowingly" in KRS 501.020(2) defines the term even more narrowly than does the Model Code. Robert G. Lawson and William H. Fortune, *Kentucky Criminal Law* § 2-2(c)(1) (Lexis 1998). That, however, does not mean that a different approach is unconstitutional. Our inquiry is not whether KRS 121.015(10) "ought" to require

actual knowledge but whether requiring less denies Appellants their Due Process and First Amendment rights. Those statutes that require only something similar to constructive knowledge are premised upon a recognition that "wilful blindness" is equivalent to knowledge. *See* Lawson and Fortune, *supra,* § 2-2(c)(2); Rollin M. Perkins, *Criminal Law,* ch. 7, § 4C (2d ed. Found. Press 1969).

> [O]ne with [a deliberate antisocial purpose] may deliberately "shut his eyes" to avoid knowing what would otherwise be obvious to view. In such cases, so far as criminal law is concerned, the person acts at his peril in this regard, and is treated as having "knowledge" of the facts as they are ultimately discovered to be.

Perkins, at 776. Thus, in *Commonwealth v. Griffin,* Ky., 759 S.W.2d 68 (1988), we held that the *mens rea* element of "knowingly or having reason to believe" in KRS 514.150 was sufficient to uphold a criminal conviction. *Id.* at 69. Similarly, we now hold that the *mens rea* element of "aware or should have been aware" in KRS 121.015(10) suffices to support a criminal conviction under KRS 121.990(3) because it requires Appellants to have sufficient knowledge of the nature of their conduct so as not to deny them their Due Process and First Amendment rights.

Accordingly, we affirm the Court of Appeals and remand this case to the Franklin Circuit Court for further proceedings not inconsistent with this opinion.

Lambert, C.J.; Graves, Keller and Wintersheimer, JJ., concur. Johnstone, J., dissents by separate opinion. Stumbo, J., not sitting.

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DISSENTING OPINION BY JUSTICE JOHNSTONE

The trial judge in this case correctly ruled that KRS 121.150(1)[1] is unconstitutional on its face and cannot be enforced against the appellants. Because the majority opinion erroneously affirms the Court of Appeals' opinion that reverses that decision, I respectfully dissent.

I. Introduction

The indictment against the appellants alleges that they violated KRS 121.150(1) by "knowingly making or receiving a contribution of a thing of value which was neither an independent expenditure to support or defeat a candidate nor made to the duly appointed campaign manager or campaign treasurer of the Patton/Henry slate of candidates." As made clear by the allegations contained

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[1] All statutory citations in this dissent are to the 1994 versions of the statute.

in the Bill of Particulars, these charges involve expenditures made by third parties that allegedly benefitted the Patton/Henry gubernatorial campaign. The majority opinion accepts this assessment in concluding that "Appellants were indicted for making contributions . . . in the form of 'coordinated' expenditures to the Patton/Henry slate. . . ." *Slip op.* at 17-18. But the majority's use of the term "coordinated expenditures" is misleading.

The term "coordinated expenditure" comes from the U.S. Supreme Court's seminal case on campaign-finance regulation. *Buckley v. Valeo,* 424 U.S. 1, 96 S. Ct. 612, 46 L. Ed. 2d 659 (1976). In *Buckley,* the U.S. Supreme Court addressed the constitutionality of "key provisions of the Federal Election Campaign Act of 1971 [FECA]." *Id.* at 6, 96 S. Ct. at 629, 46 L. Ed. 2d at 680. The case stands as the benchmark against which the constitutionality of all other campaign-finance regulation is made. The majority attempts to shoehorn KRS 121.150(1) into *Buckley*'s dictates through verbal manipulation and gerrymandering. But *Buckley*'s limits on the General Assembly's reach are not as malleable as the majority suggests.

As used in *Buckley,* "coordinated expenditure" is clearly defined by statute to mean an expenditure "authorized or requested by a candidate." But the majority construes KRS 121.150(1) to define "coordinated expenditure" as any campaign-related expenditure that is not "independent" within the meaning of the statute. In other words, under the majority's construction of the statute, "coordinated expenditure" is defined expansively in terms of what it is not rather than in terms of what it is. Under this reverse definition, "coordinated expenditures" embrace a wide range of campaign-related expenditures that constitutionally can be neither limited in amount nor

required to be disclosed. Thus, the majority opinion's narrowing construction of KRS 121.150(1)'s definition of "independent expenditure" merely expands the statute's definition of "coordinated expenditure" and fails to correct the statute's inherent constitutional flaw.

II. Discussion

As did the majority, I begin my discussion with *Buckley* and its discussion on spending limits.

Section 608 of FECA prohibited "individuals from contributing more than $25,000 in a single year or more than $1,000 to any single candidate for an election campaign and from spending more than $1,000 a year 'relative to a clearly identified candidate.'" *Id.* at 13, 96 S. Ct. at 631-32, 46 L.Ed.2d at 684. (*Buckley* referred to the expenditures encompassed by § 608 as "independent expenditures.") While limits on both campaign-related contributions and expenditures "operate in an area of the most fundamental First Amendment activities," the *Buckley* Court determined that limits on campaign-related expenditures deserve closer scrutiny than restrictions on campaign-related contributions. *Id.* at 14-23, 96 S. Ct. at 632-36, 46 L. Ed. 2d at 684-90. The Court made, and has continued to carefully maintain this distinction, because "[r]estraints on expenditures generally curb more expressive and associational activity than limits on contributions do." *Federal Election Commission v. Colorado Republican Federal Campaign Committee,* 533 U.S. 431, 440, 121 S. Ct. 2351, 2358, 150 L. Ed. 2d 461, 472 (2001). Accordingly, the *Buckley* Court upheld FECA's spending limits on contributions, but struck down the spending limits on expenditures.

The *Buckley* Court's discussion of FECA's spending limit provisions is important to this case, because this is where *Buckley*'s discussion of "coordinated expenditures" is found; however, it takes a bit of explanation to get there. In beginning its spending-limit discussion, the *Buckley* Court stated:

> The Act's expenditure ceilings impose direct and substantial restraints on the quantity of political speech. The most drastic of the limitations restricts individuals and groups, including political parties that fail to place a candidate on the ballot, to an expenditure of $1,000 "relative to a clearly identified candidate during a calendar year." § 608(e)(1). Other expenditure ceilings limit spending by candidates, § 608(a), their campaigns, § 608(c), and political parties in connection with election campaigns, § 608(f). It is clear that a primary effect of these expenditure limitations is to restrict the quantity of campaign speech by individuals, groups, and candidates. The restrictions, while neutral as to the ideas expressed, limit political expression "at the core of our electoral process and of the First Amendment freedoms."

Buckley, 424 U.S. at 39, 96 S. Ct. at 644, 46 L. Ed. 2d at 699.

The *Buckley* Court concluded that § 608(e)(1) was unconstitutionally vague because the

> key operative language of the provision limits "any expenditure . . . relative to a clearly identified candidate." Although "expenditure," "clearly identified," and "candidate" are defined in the Act, there is no definition clarifying what expenditures are "relative to" a candidate. The use of

> so indefinite a phrase as "relative to" a candidate fails to clearly mark the boundary between permissible and impermissible speech, unless other portions of § 608(e)(1) make sufficiently explicit the range of expenditures covered by the limitation.

Id. at 41-42, 96 S. Ct. at 645, 46 L. Ed. 2d at 700.

The *Buckley* Court, however, determined that the range of expenditures covered by § 608(e)(1) could be made sufficiently explicit by construing the phrase "relative to a candidate" to mean "advocating the election or defeat of a candidate." *Id.* at 42, 96 S. Ct. at 645-46, 46 L. Ed. 2d at 700-01. Still, this did not eliminate the vagueness problem because

> the distinction between discussion of issues and candidates and advocacy of election or defeat of candidates may often dissolve in practical application. Candidates, especially incumbents, are intimately tied to public issues involving legislative proposals and governmental actions. Not only do candidates campaign on the basis of their positions on various public issues, but campaigns themselves generate issues of public interest.

Id.

The *Buckley* Court then held that the vagueness problem with § 608(e)(1) only could be eliminated by further limiting the reach of the statute's spending limits by construing it "to apply only to expenditures for communications that in express terms advocate the election or defeat of a clearly identified candidate for federal office." *Id.* at 44, 96 S. Ct. at 646-47, 46 L. Ed. 2d at 702. Even so narrowly and explicitly construed, the statute was still unconstitutional because "the governmental interest in

preventing corruption and the appearance of corruption is inadequate to justify § 608(e)(1)'s ceiling on independent expenditures." *Id.* at 45, 96 S. Ct. at 647, 46 L. Ed. 2d at 702. One of these governmental interests is of great importance to this case.

The proponents of § 608(e)(1) argued that the statute was necessary to

> prevent would-be contributors from avoiding the contribution limitations by the simple expedient of paying directly for media advertisements or for other portions of the candidate's campaign activities . . . [and] *that expenditures controlled by or coordinated with the candidate and his campaign might well have virtually the same value to the candidate as a contribution* and would pose similar dangers of abuse.

Id. at 46, 96 S. Ct. at 647, 46 L. Ed. 2d at 703 (emphasis added). The *Buckley* Court rather summarily dismissed this argument by noting that "such *controlled or coordinated expenditures* are treated as contributions rather than expenditures under the Act." *Id.* at 46, 96 S. Ct. at 647-48, 46 L. Ed. 2d at 703 (emphasis added). The argument had no merit because "Section 608(b)'s contribution ceilings rather than § 608(e)(1)'s independent expenditure limitation prevent attempts to circumvent the Act through prearranged or coordinated expenditures amounting to disguised contributions." *Id.* at 46-47, 96 S. Ct. at 648, 46 L. Ed. 2d at 703-04.

Thus, under *Buckley,* "coordinated expenditure" means an expenditure "authorized or requested by the candidate, an authorized committee of the candidate, or an agent of the candidate." *Id.* at 46, n. 53, 96 S. Ct. at 648, n. 53, 46 L. Ed. 2d at 703, n. 53 (citing § 608(c)(2)(B) of the Act).

KRS Chapter 121's definition of section does not define "contribution" to include coordinated expenditures as that term is used in *Buckley*. Rather, the only definition of "contribution" that applies to expenditures of any sort is KRS 121.015(6)(e): "'Contribution' means any ... [e]xpenditure in connection with any other activity undertaken independently of the activities of a candidate, slate of candidates, committee, or contributing organization made or furnished for the purposes of influencing the results of an election." This definition is unconstitutional on its face because it includes "exactly the type of independent activity that *Buckley* held could not be restricted." *Slip Op.* at 17. The definition is void and has no effect. Further, KRS Chapter 121's definition of section does not define either the term "expenditure" or "coordinated expenditure." Therefore, any definition of those terms must be found in KRS 121.150(1) itself.

KRS 121.150(1) places affirmative obligations on all persons or groups who make expenditures to support or defeat a candidate ("campaign-related expenditures"). The form of the obligation depends on the type of expenditure made. "independent" campaign-related expenditures over $500 must be reported directly to the Registry. All other campaign-related expenditures must be made through a "duly appointed campaign manager, or campaign treasurer." The majority opinion considers these non-independent, campaign-related expenditures to be "coordinated expenditures" that can be treated as "contributions" under *Buckley*. *See Slip Op.* at 17-18. The Commonwealth clearly gives the statute this construction. The Bill of Particulars alleges that the appellants "violated KRS 121.150(1) by contributing a 'thing of value' to the Patton campaign [that] was not made to [Patton's] campaign manager or ...

treasurer . . . and which was not an *independent expenditure.*" (Emphasis added). Thus, while KRS 121.150(1) does not expressly define "coordinated expenditure," it implicitly defines it in terms of what is not an "independent expenditure." This inclusive and implicit definition is contrary to the exclusive and explicit definition of the same term in *Buckley.* This difference in definition is what makes KRS 121.150(1) unconstitutionally overbroad on its face.

KRS 121.150(1) defines the term "independent expenditure" to mean an expenditure

> made for a communication which expressly advocates the election or defeat of a clearly identified candidate or slate of candidates, or the passage or defeat of a constitutional amendment or public question which will appear on the ballot and which is not made with any direct or indirect cooperation, consent, request, suggestion, or consultation involving a candidate, slate of candidates, campaign committee, political issues committee, or agent.

The above definition is detailed, precise and, well, definite. It is the inverse of *Buckley's* definition of the same term. *Buckley* uses the term "independent expenditure" broadly and indefinitely to refer to FECA's spending limits on all "expenditures by individuals and groups 'relative to a clearly identified candidate.'" *Buckley,* 424 U.S. at 7, 96 S. Ct. at 629, 46 L. Ed. 2d at 681. Thus, *Buckley's* use of the term "independent expenditure" corresponds the closest with KRS 121.150(1)'s phrase "expenditures . . . made . . . to support or defeat a candidate." On the other hand, KRS 121.150(1)'s definition of "independent expenditure" corresponds with *Buckley's*

narrow and explicit construction of the term "expenditure."

The language "expressly advocates the election or defeat of a clearly identified candidate" contained in KRS 121.150(1)'s definition of "independent expenditure" is obviously patterned after the *Buckley* Court's narrow construction of § 608(e)(1), which limited that statute's application "only to expenditures for communications that in express terms advocate the election or defeat of a clearly identified candidate for federal office." *Buckley,* 424 U.S. at 44, 96 S. Ct. at 646-47, 46 L. Ed. 2d at 702. Recall that the *Buckley* Court narrowly construed § 608(e)(1) this way to avoid the inherent vagueness problem of applying FECA's spending limits to "independent expenditures" as that term was used in *Buckley.* Further recall that, by definition, expenditures that were "authorized or requested by a candidate" (coordinated expenditures) were excluded from the definition of "independent expenditures" in *Buckley.* Thus, under *Buckley*'s narrow construction of § 608, "expenditures" comprised a small, discrete subset of the whole set of "independent expenditures," as that term is used in *Buckley.*

Unlike *Buckley,* under KRS 121.150(1) it is "independent expenditures" that comprise a small, discrete subset of a much greater set. This greater set consists of all "expenditures . . . made . . . to support or defeat a candidate." But the greater set of KRS 121.150(1) is larger than Buckley's set of "independent expenditures" because, under *Buckley,* "independent expenditures" expressly excluded expenditures "authorized or requested by a candidate," whereas such expenditures are not excluded from KRS 121.150(1)'s phrase "expenditures . . . made . . . to support or defeat a candidate" and, thus, necessarily fall somewhere within it.

But also falling within that phrase are expenditures made for "exactly the type of independent activity that *Buckley* held could not be restricted." Therefore, under *Buckley,* all expenditures "relative to a clearly identified candidate" ("independent expenditures") that are not "expenditures for communications that in express terms advocate the election or defeat of a clearly identified candidate" ("expenditures") are campaign-related expenditures that constitutionally can be subject to neither spending limits nor reporting requirements. On the other hand, under KRS 121.150(1) "expenditures . . . made . . . to support or defeat a candidate" (all campaign-related expenditures) that are not "independent expenditures" within the meaning of the statute, include both "independent expenditures" and "coordinated expenditures" as those two terms are used in *Buckley.* Thus, in the context of the case at bar, the statute's constitutional infirmity lies not in the type of expenditures included in KRS 121.150(1)'s definition of "independent expenditure," but rather, the infirmity lies in the type of expenditures excluded by the definition, which indiscriminately includes both "independent expenditures" and "coordinated expenditures" as those terms are used in *Buckley.* And it applies to these campaign-related expenditures in a way prohibited by *Buckley,* as can be shown through *Buckley*'s discussion of FECA's disclosure and reporting provisions.

Reporting and disclosure are not the same thing. "Disclosure" refers to statutory provisions that compel *political candidates, parties and committees* to keep detailed records of contributions and expenditures and to disclose this information through regular pre- and post-election reports to a governmental agency. *See Buckley,*

424 U.S. at 60-63, 96 S. Ct. at 654-55, 46 L. Ed. 2d at 711-12 (emphasis added). "Reporting" refers to statutory provisions that require "direct disclosure of what *an individual or group* contributes or spends." *Id.* at 75, 96 S. Ct. at 661, 46 L. Ed. 2d at 719 (emphasis added).

The Kentucky disclosure provisions require *any candidate, slate of candidates, or political issue committee* to make a report to the Kentucky Registry of Election Finance ("Registry") that includes *inter alia* a list of the full name, address, occupation and employer of any person making a contribution over $100, as well as the date on which the contribution was made; and (2) a "complete statement of all expenditures authorized, incurred or made." KRS 121.180(3)(a). In turn, the Registry is required to make these reports available for inspection and copying. KRS 121.120(4)(f). These provisions are very similar to those in FECA, which were discussed in *Buckley*. *Id.* at 62-64, 96 S. Ct. at 655-56, 46 L. Ed. 2d at 712-13.

The *Buckley* Court held that FECA's disclosure requirements were constitutional. *Id.* at 64-68, 96 S. Ct. at 655-56, 46 L. Ed. 2d at 713-16. Likewise, and for the same reasons which are not relevant here, I believe that the Kentucky disclosure statutes are constitutional. But *Buckley*'s "disclosure" discussion is not relevant to the case at bar. Rather, what is relevant is *Buckley*'s discussion and examination of FECA's reporting statute, § 434.

Section 434 of FECA imposed no spending limits on either contributions or expenditures. Instead, it required "every person (other than a political committee or candidate) who makes contributions or expenditures aggregating over $100 in a calendar year other than by contribution to a

political committee or candidate to file a statement with the [Federal Election Commission]." *Id.* at 74-75, 96 S. Ct. at 661, 46 L. Ed. 2d at 719 (internal quotation marks omitted). Violation of the statute carried criminal penalties. *Id.* at 76, 96 S. Ct. at 661, 46 L. Ed. 2d at 720. Similarly, KRS 121.150 imposes no limits on either campaign-related contributions or expenditures. Instead, it requires that all contributions and expenditures, other than "independent expenditures," be made only through [a] candidate's campaign manager or treasurer. "Independent expenditures" over $500 are to be directly reported to the Registry. And, violation of the statute is a felony offense. KRS 121.990(3). In the context of this case, the only possible difference in the two statutes is KRS 121.150(1)'s bifurcation of reporting requirements between (1) the Registry, and (2) "only through [a] duly appointed campaign manager." The difference is of no practical consequence.

First of all, it was § 434's criminal penalties for individuals and groups who failed to report a contribution or expenditure that caused the *Buckley* Court the most concern about the statute's constitutionality. *See Buckley,* 424 at 76-77, 96 S. Ct. at 662, 46 L. Ed. 2d at 720 (§ 434 "raises serious problems of vagueness, particularly treacherous where, as here, the violation of its terms carries criminal penalties and fear of incurring these sanctions may deter those who seek to exercise protected First Amendment rights."). Further, KRS 121.150(1)'s requirement that a campaign-related contribution or non-independent expenditure shall be made "only through [a] duly appointed campaign manager, or campaign treasurer" is, for all practical purposes, a reporting requirement.

While no report is made directly to the Registry under the "through [a] duly appointed campaign manager" requirement, the candidate, through whose campaign manager the contribution or non-independent expenditure is made, is required to file a detailed report of the information to the Registry. KRS 121.180(3)(a). This report includes the full name and address of the person making the contribution or expenditure. In turn, the Registry is required to make these reports available for public inspection and copying. KRS 121.120(4)(f). From the standpoint of the person or group making a campaign-related contribution or expenditure, there is no appreciable difference between directly reporting vital information about a campaign-related contribution or expenditure to the Registry and indirectly reporting the same information through a "duly appointed campaign manager." Therefore, the reach of KRS 121.150(1)'s reporting requirement is necessarily constrained by what is constitutionally permissible under *Buckley* and its progeny, because (1) neither § 434 nor KRS 121.150(1) imposes any constraints on the amount of campaign-related contributions or expenditures that individuals or groups can make, (2) both KRS 121.150(1) and § 434 of FECA affirmatively require individuals and groups to report campaign-related contributions and expenditures, (3) violation of both statutes is a criminal offense, and (4) both statutes' reporting requirements implicate core First Amendment rights.

In its discussion of § 434, the *Buckley* Court separately examined the constitutionality of the statute as applied to contributions and expenditures, just as it did in its discussion of FECA's spending-limit provisions. In this discussion, the Court noted that FECA's reporting and

disclosure provisions used the same definition of "contribution" as was used in the spending limit provisions. *Buckley,* 424 U.S. at 78, 96 S. Ct. at 663, 46 L. Ed. 2d at 721. That is, FECA defined "contribution" to include expenditures "authorized or requested" by a candidate for purposes of § 434. The *Buckley* Court held that the reporting provisions were constitutional as applied to contributions because, "[s]o defined, 'contributions' have a sufficiently close relationship to the goals of the Act, for they are connected with a candidate or his campaign." *Id.* at 78, 96 S. Ct. at 663, 46 L. Ed. 2d at 721-22. The individual reporting requirements of § 434 as applied to "expenditures" gave the Court more pause.

Just as it began its discussion on FECA's spending-limit provisions, the *Buckley* Court began its discussion of § 434 by addressing an inherent vagueness problem with the statute. This time, the language that gave the Court trouble was the phrase "for the purpose of . . . influencing an election or nomination," which the Court determined had the "potential for encompassing both issue discussion and advocacy of a political result." *Id.* at 79, 96 S. Ct. at 663, 46 L. Ed. 2d at 722. The Court concluded that this was overbroad. *Id.* at 79-80, 96 S. Ct. at 663-64, 46 L. Ed. 2d at 722. Thus, to insure that the reach of § 434(e) was not impermissibly broad, the *Buckley* Court construed "expenditure" for purposes of § 434 in the same way it construed "expenditure" in FECA's spending-limit provisions, *i.e.,* "to reach only funds used for communications that expressly advocate the election or defeat of a clearly identified candidate." *Id.* at 80, 86 S. Ct. at 664, 46 L. Ed. 2d at 722. But unlike § 608's spending limits on expenditures, the *Buckley* Court held that § 434's reporting requirement of expenditures was constitutional in light of its narrow

construction of the statute because it bore a "sufficient relationship to [the] substantial governmental interest[s]" of preventing election corruption and the appearance of corruption. *Id.* at 80, 96 S. Ct. at 664, 46 L. Ed. 2d at 722.

In concluding its § 434 discussion, the *Buckley* Court provided a summary of when § 434(e), as construed, imposed independent reporting requirements on individuals and groups that were not candidates or political committees. Reporting under the statute was required

> only in the following circumstances: (1) when they make contributions earmarked for political purposes or *authorized or requested by a candidate or his agent, to some person other than a candidate or political committee,* and (2) when they make expenditures for communications that expressly advocate the election or defeat of a clearly identified candidate.

Id. at 80, 96 S. Ct. at 664, 46 L. Ed. 2d at 722-23 (emphasis added).

The "authorized or requested" language mirrors FECA's description of the types of expenditures (coordinated) that are included in the definition of "contribution" and, consequently, that are excluded from the definition of "expenditure." Thus, under *Buckley,* the General Assembly may only require individuals and groups, who are not candidates or political committees, to report expenditures (1) that are authorized or requested by a candidate or his or her agent, or (2) that are made for communications that expressly advocate the election or defeat of a clearly identified candidate. By defining "coordinated expenditures" as any expenditure that is not "independent" within

the meaning of the statute, KRS 121.150(1) goes much further than *Buckley* allows.

KRS 121.150(1) requires the reporting of *all* expenditures made "to support or defeat" a candidate or slate of candidates, except "independent expenditures" under $500. This requirement indiscriminately embraces both direct advocacy and the discussion of issues. It applies exactly to the type of "independent expenditures" that the government cannot require to be reported. The statute is too broad. The majority's narrowing construction of the term "independent expenditure" does nothing to solve this problem, because it only affects to whom campaign-related expenditures have to be reported; it fails to affect the range of campaign-related expenditures that are required to be reported under the statute, which is where the constitutional infirmity of the statute lies.

Finally, KRS 121.150(1)'s definition of "coordinated expenditures" in terms of what it is not rather than in terms of what it is, creates yet another problem that makes the statute unenforceable. Under the majority's construction of KRS 121.150(1), to prove violation of the statute at trial, the Commonwealth will have to show that the alleged expenditures (1) were made to support or defeat a candidate, and (2) the expenditures were not "independent" as that term has been construed by the majority. Thus, all non-"independent expenditures" are non-rebuttably presumed to be "coordinated" under KRS 121.150(1). This presumption is not enforceable. *See Federal Election Commission v. Colorado Republican Federal Campaign Committee,* 518 U.S. 604, 621-22, 116 S. Ct. 2319, 135 L. Ed. 2d 795, 809 (1996).

III. Conclusion

KRS 121.150(1) is unconstitutional on its face because it requires campaign-related expenditures to be reported that cannot be required to be reported under *Buckley,* and because it creates the impermissible presumption that all non-independent expenditures are "coordinated." Because the reporting requirement applies to all expenditures made to support or defeat a candidate, it inescapably reaches expenditures that neither expressly advocate the election or defeat of a clearly identified candidate nor are authorized or requested by a candidate. The majority's attempt to save the constitutionality of the statute through a narrow construction of the term "independent expenditure" misses the mark because it does not limit the type of campaign-related expenditures that are subject to the statute's reach. Finally, the unconstitutionality of the statute renders all the charges in the indictment against the appellants unenforceable.

Counts I and IV of the Indictment cannot be maintained because they allege a violation of KRS 121.150(1), which is unconstitutional and cannot be enforced against the appellants.

Count II of the Indictment cannot be maintained because the Bill of Particulars alleges that appellant Martin violated KRS 121.150(12) because he "knowingly accepted a contribution made by Ross, Fields and Winstead." But the alleged "contribution" is in the form of an expenditure. The applicable definition of contribution that applies to expenditures is unconstitutional on its face. Therefore, any expenditure made or received by the appellants cannot be considered a "contribution" within the meaning of KRS 121.150(12).

Counts III and V of the Indictment cannot be maintained because the charges are based on the allegation that the appellants violated KRS 121.150(1). Because the statute is unconstitutional, there is no underlying offense to support the allegation.

For the reasons set forth above, I respectfully dissent.

RENDERED: NOVEMBER 9, 2000; 10:00 a.m.
TO BE PUBLISHED

Commonwealth Of Kentucky

Court Of Appeals

NO. 1999-CA-001367-MR

COMMONWEALTH OF KENTUCKY APPELLANT

APPEAL FROM FRANKLIN CIRCUIT COURT
HONORABLE WILLIAM W. TRUDE, JR.,
v. SPECIAL JUDGE
INDICTMENT NOS. 98-CR-00136-001,
98-CR-00136-002, 98-CR-00136-003
AND 98-CR-00136-004

ANDREW J. "SKIPPER" MARTIN;
DANNY ROSS; LON FIELDS; and
ROBERT WINSTEAD APPELLEES

OPINION

REVERSING AND REMANDING

* * *

BEFORE: HUDDLESTON, McANULTY and SCHRODER, Judges.

HUDDLESTON, Judge: The Commonwealth of Kentucky appeals from a Franklin Circuit Court order declaring part of Kentucky's campaign finance law unconstitutional and dismissing indictments against Andrew J. "Skipper" Martin, Danny Ross, Lon Fields and Robert Winstead.

I. FACTS AND PROCEDURAL HISTORY

The appellees were participants in the 1995 Paul Patton/Steve Henry gubernatorial campaign. The Patton/Henry slate chose to accept public financing pursuant to Kentucky Revised Statute (KRS) 121A.030,[1] which limited the campaign's spending to $1.8 million and prohibited coordination with others to influence the campaign's spending. Martin served as manager of the Patton/Henry campaign. Ross initially worked as labor liaison in then Lieutenant Governor Patton's office, but eventually worked as a political coordinator for Joint Council 94, a group comprised of representatives from various Teamster Union locals. Fields and Winstead – who were the President and Secretary/Treasurer, respectively, of Teamsters Local 89 – were members of Joint Council 94.

Following the successful election of Patton as Governor and Henry as Lieutenant Governor, both the Democratic and Republican Parties filed complaints with the Kentucky Registry of Election Finance, alleging campaign finance law violations. The Attorney General's office began

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[1] Ky. Rev. Stat. (KRS) 121A.030 provides, in relevant part, that:

> A qualifying slate of candidates for Governor and Lieutenant Governor that receives transfers from the fund may make campaign expenditures which, in the aggregate, including the expenditure of transfers from the fund, shall not exceed one million eight hundred thousand dollars ($1,800,000) in connection with a primary election campaign and one million eight hundred thousand dollars ($1,800,000) in connection with a regular election campaign, subject to the provisions of KRS 121A.080 (4) and (5). . . .

KRS 121A.030(1) (1995). (The statute was amended in 1996).

a lengthy investigation, in conjunction with the Registry of Election Finance, into the activities of the 1995 Patton/Henry campaign. On September 24, 1998, a grand jury handed up indictments charging the appellees with various violations of state campaign finance laws.

The first count of the indictment charges that between June 1, 1995, and December 12, 1995, Martin, Ross, Fields and Winstead committed the offense of knowingly making or receiving a contribution of a thing of value that was neither an independent expenditure to support or defeat a candidate nor made to the duly appointed campaign manager or treasurer of the Patton/Henry slate of candidates, in violation of KRS 121.150(1).[2] The indictment also

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[2] KRS 121.150(1) provides, in relevant part, that:

> No contribution of money or other thing of value, nor obligation therefor, shall be made or received, and no expenditure of money or other thing of value shall be made or incurred, directly or indirectly, other than an "independent expenditure," to support inauguration activities or to support or defeat a candidate, a slate of candidates, constitutional amendment, or public question which will appear on the ballot in an election, except through the duly appointed campaign manager, or campaign treasurer of the candidate, slate of candidates, or registered committee. As used in this section, "independent expenditure" means one made for a communication which expressly advocates the election or defeat of a clearly identified candidate or slate of candidates, or the passage or defeat of a constitutional amendment or public question which will appear on the ballot and which is not made with any direct or indirect cooperation, consent, request, suggestion, or consultation involving a candidate, slate of candidates, campaign committee, political issues committee, or agent. Any person making an "independent expenditure," as defined in this subsection, shall report these

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alleges that they acted in complicity with others, violating KRS 502.020.[3]

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expenditures when the expenditures exceed five hundred dollars ($500) in the aggregate in any one (1) election, on forms provided by the [Kentucky Registry of Election Finance].

KRS 121.150(1) (1995) (amended 1996 and 1998). One who violates KRS 121.150(1) commits a Class D felony, which carries a penalty of one to five years' imprisonment. KRS 121.990(3) (1995) (amended 1996).

[3] KRS 502.020 provides:

(1) A person is guilty of an offense committed by another person when, with the intention of promoting or facilitating the commission of the offense, he:

(a) Solicits, commands, or engages in a conspiracy with such other person to commit the offense; or

(b) Aids, counsels, or attempts to aid such person in planning or committing the offense; or

(c) Having a legal duty to prevent the commission of the offense, fails to make a proper effort to do so.

(2) When causing a particular result is an element of an offense, a person who acts with the kind of culpability with respect to the result that is sufficient for the commission of the offense is guilty of that offense when he:

(a) Solicits or engages in a conspiracy with another person to engage in the conduct causing such result; or

(b) Aids, counsels, or attempts to aid another person in planning or engaging in the conduct causing such result; or

(c) Having a legal duty to prevent the conduct causing the result, fails to make a proper effort to do so.

Second, the indictments charge that between June 1, 1995, and December 12, 1995, the appellees knowingly made a payment, distribution, loan, advance, deposit or gift of money to another person to contribute to Patton and Henry or anyone on the appellees' behalf or knowingly accepted a contribution made by one who has received a payment, distribution, loan, advance, deposit or gift of money from another to contribute to candidates Patton and Henry or anyone on their behalf, in violation of KRS 121.150(12).[4] They also allegedly acted in complicity with others in violation of KRS 502.020.

Third, the indictments charge that between June 1, 1995, and March 31, 1996, the appellees knowingly participated in arranging or obtaining a gubernatorial appointive position, thus violating KRS 121.056(1).[5] They

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[4] In relevant part, KRS 121.150(12) provides:

> No person shall make a payment, distribution, loan, advance, deposit, or gift of money to another person to contribute to a candidate, committee, contributing organization, nor anyone on their behalf shall accept a contribution made by one (1) person who has received a payment, distribution, loan, advance, deposit or gift of money from another person to contribute to a candidate, committee, contributing organization, or anyone on their behalf.

KRS 121.150(12) (1995) (amended 1996 and 1998). A violation of KRS 121.150(12) is a Class D felony, which carries a penalty of one to five years' imprisonment. KRS 121.990(3) (1995) (amended 1996).

[5] KRS 121.056(1) provides:

> No person who contributes more than four thousand dollars ($4,000) to a gubernatorial candidate shall hold any appointive state office or position, which shall be made by gubernatorial appointment, during the term of office following the campaign in which the contribution shall be made.

(Continued on following page)

also allegedly acted in complicity with others, in violation of KRS 502.020.

Fourth, the indictments charge that between October 1, 1995, and November 7, 1995, Martin and Ross knowingly made or received a contribution of a thing of value that was neither an independent expenditure to support or defeat a candidate nor made to the duly appointed campaign manager or campaign treasurer of the Patton/Henry campaign, in violation of KRS 121.150. They also violated KRS 502.020, it is alleged, by acting in complicity with others.

Finally, the indictments charge that between January 1, 1995, and December 12, 1995, the appellees, with the intention of promoting or facilitating the commission of a crime, agreed that one or more of them would engage in conduct constituting a crime by knowingly making or receiving a contribution of more than $500.00 in any one election to the Patton/Henry campaign after the slate had filed a statement of intent to accept transfers from the Kentucky state election campaign fund and abide by the maximum expenditure limit, which had not been rescinded, in violation of 121A.050(1).[6] In addition, they

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If convicted of violating KRS 121.056(1), a person can be sentenced to one to five years' imprisonment. KRS 121.990(9)-(12) (1995) (amended 1996).

[6] KRS 121A.050(1) provides, in part:

> A slate of candidates that has filed a statement of intent to accept transfers from the fund and abide by the maximum expenditure limit which was not rescinded pursuant to KRS 121A.040(4) shall not knowingly accept a contribution from a natural person, permanent committee, executive

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allegedly conspired to violate the contribution limitations, in violation of KRS 506.040.[7]

A discussion of the purported facts is necessary to lay the groundwork for the legal analysis that follows.

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committee of a political party, or contributing organization of more than five hundred dollars ($500) in any one (1) election. Except for independent expenditures, as defined in KRS 121.150(1), no natural person, permanent committee, executive committee of a political party, or contributing organization shall knowingly make a contribution of more than five hundred dollars ($500) in any one (1) election to a slate of candidates that has filed a statement of intent to accept transfers from the fund and abide by the maximum expenditure limit which was not rescinded.

KRS 121A.050(1) (1995) (amended 1996). If convicted of violating this statute, the penalty is one to five years' imprisonment. KRS 121.990(3)-(6) (1995) (amended 1996); KRS 121A.990(1), (3).

[7] KRS 506.040 provides, in relevant part:

(1) A person having the intention of promoting or facilitation the commission of a crime is guilty of criminal conspiracy when he:

(a) Agrees with one (1) or more persons that at least one (1) of them will engage in conduct constituting that crime or an attempt or solicitation to commit such a crime; or

(b) Agrees to aid one or more persons in the planning or commission of that crime or an attempt or solicitation to commit such a crime.

(2) Except as provided in a specific statute to the contrary, a criminal conspiracy is a:

* * *

(d) Class A misdemeanor when the object of the conspiratorial agreement is a Class C or D felony[.]

However, in contrast to most appeals to this Court, neither the circuit court nor a jury has conducted fact finding. In outlining the purported facts, we are relying on the grand jury testimony of numerous witnesses, including the appellees. When these cases proceed to trial, different or additional evidence may be presented. We wish to make it clear that we are *not* passing judgment on the guilt or innocence of the appellees; rather, we are addressing the merits of their constitutional claims.

According to the Commonwealth, Martin orchestrated efforts to evade the campaign spending limits beginning as early as 1992. At the time, Ross was the labor liaison in the Lieutenant Governor Patton's office. Martin purportedly felt that it was critical for Ross to work on the campaign without using campaign funds to pay Ross.

To pay Ross's salary when he left Lieutenant Governor Patton's office and began working for Joint Council 94, Fields and Winstead obtained half of the funding from the International Brotherhood of Teamsters' Democratic, Republican, Independent Voter Education Committee (IBT D.R.I.V.E.), the national Teamsters' political action committee (PAC). In March 1995, Martin and Winstead traveled to Washington, D.C. to meet with IBT D.R.I.V.E. director Bill Hamilton to secure the funding. Martin maintains that the purpose of the meeting was to obtain the Teamsters' endorsement of the Patton/Henry candidacy. After the trip, Hamilton approved the expenditure of $10,000.00 of IBT D.R.I.V.E.'s funds for Ross's salary.

In June 1995, Boss left the Lieutenant Governor's office and began working for Joint Council 94, a group made up of representatives from various Teamster local unions, including Fields and Winstead. Fields and

Winstead purportedly proposed that Joint Council 94 employ Ross as a political coordinator. Despite some opposition, Joint Council 94 hired Ross. With his new employer, Ross filled the newly created position of political coordinator for a period of twenty weeks for a salary of $20,000.00. At the end of the campaign, the Teamsters had spent some $61,000.00.

Subsequently, Joint Council 94 assigned Ross to the AFL-CIO, but Ross remained in frequent contact with the campaign. Martin's campaign assistant purportedly retuned calls from Ross to Martin. In addition, Ross was the only AFL-CIO coordinator who regularly communicated with the campaign. Ross also allegedly followed orders from Martin while Martin and Alice McDonald were at Patton/Henry headquarters. The campaign also kept in frequent contact with Fields and Winstead. Despite Martin's practice of not taking telephone calls, Martin would speak to Fields when he called. According to the telephone records, the Commonwealth claims, there were 134 phone calls from Teamsters Local 89 to the Lieutenant Governor's Office and Mansion between July and October, 1995. Ross claims that there were only four to six calls.

As part of its campaign effort, the Patton/Henry campaign created a "board of directors," whose membership included union officials. These individuals were privy to campaign strategy and financial information. Martin directed Ross to have Jerry Vincent implement monthly breakfast meetings at which campaign workers ate at no cost. Martin and Ross frequently attended the breakfast meetings, which allowed the campaign and labor unions to exchange information to promote the effective expenditure

of funds. Ross, it is claimed, set the agendas for the breakfast meetings, conveyed the campaign's message to the meetings' attendees, and controlled the message relayed via union-funded telephone banks. Martin and Ross also purportedly influenced the telephone banks' location and length of operation.

The Commonwealth contends that Ross's position with the AFL-CIO allowed Martin to influence the organization's spending of funds. In October 1995, Clarence Frost, another of the AFL-CIO's political coordinators, dined with Martin and Ross and their spouses and discussed the AFL-CIO's election plans. During the campaign, the AFL-CIO spent approximately $247,000.00.

In October 1995, the National Council of Senior Citizens contacted Frost, indicating its desire to spend $10,000.00 on pro-Patton radio advertisements. It requested that Frost obtain a script. Frost purportedly contacted Martin, who in turn referred Frost to the campaign's advertising firm. Frost contacted the firm, which drafted two ads. The firm faxed the completed ads to the Patton/Henry campaign and then to Frost. Frost forwarded the ads to the Council, which spent $8,197.34 running them.

It is also alleged that Martin and Frost orchestrated the spending of Democratic Party funds for a flight involving Richard Trumka, the former president of the United Mine Workers and later secretary-treasurer of the AFL-CIO. Martin purportedly told Steve Earle, the director of the United Mine Workers of America PAC, to beg Trumka to come. On November 5, 1995, two days prior to the election, Trumka participated in a fly-around with Patton. No other candidates participated, and the Commonwealth

alleges that the rallies were exclusively in support of Patton. Martin purportedly knew that the campaign should have paid for part of the expense, but the campaign did not count it towards the $1.8 million limitation, in violation of an emergency regulation, 32 Kentucky Administrative Regulation (KAR) 1:150E.

Two days after the election, Ross returned to the Lieutenant Governor's office after resigning his position with the Teamsters. In return for hiring Ross, Winstead and Fields were purportedly rewarded with gubernatorial appointments. Winstead applied for appointment to the Kentucky Occupational Safety & Health Review Commission. Ross personally recommended the appointment, and Winstead received it at a salary of $19,400.00 per year. In March 1996, Fields received a coveted appointment to the Kentucky Racing Commission. Vincent, who did not support Ross's hiring, did not receive an appointment despite the submission of an application.

* * *

Following their indictment, the appellees moved to dismiss the indictments on the grounds that (1) they contain irregularities; and (2) KRS 121.056(1), 121.150(1) and 121.150(12) are unconstitutional under the First and Fourteenth Amendments to the United States Constitution and Sections 2, 3, 27 and 28 of the Kentucky Constitution. The circuit court denied the motion on the first ground but granted the motion on the second.

In granting the motion, the circuit court concluded that KRS 121.015(6), 121.015(10) and 121.150(1) are unconstitutional. Relying on *Buckley v. Valeo*[8] and its progeny, the court noted that the United States Supreme Court has made it clear that the legislative branch should exercise caution to avoid impinging upon individuals' First Amendment right to spend money in support of candidates for public office. Without outlining its analysis in detail, the court concluded that the definitions of "contribution" and "independent expenditure" in KRS 121.015(6) and 121.150(1), respectively, are overbroad. As a result of this conclusion, the court declared all statutes depending on those definitions unconstitutional. The court also concluded that "knowingly," as defined in KRS 121.015(10), is unconstitutionally vague. This appeal followed.

II. MOOTNESS

On appeal, the Commonwealth avers that the circuit court's conclusion that the statutes are unconstitutional is now moot because the General Assembly amended Kentucky's campaign finance laws in 1996. In support of its position, the Commonwealth cites cases from various jurisdictions. However, the Commonwealth's reliance on these cases is misplaced.

In contrast to the cases cited by the Commonwealth, this case involves people who were indicted for violating Kentucky's campaign finance laws. The cases relied on by

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[8] 424 U.S. 1, 96 S. Ct. 612, 46 L. Ed. 2d 659 (1976) (per curiam).

the Commonwealth are cases where the parties raised facial challenges to laws before the parties were criminally charged. Regardless of the safe harbor provisions of the law, "[i]t is our sworn duty, to decide such questions when they are before us by applying the constitution."[9] The appellees clearly have standing to challenge the laws because they have been impacted by the laws' application.

As a majority of the United States Supreme Court said in *Massachusetts v. Oakes*,[10] "a defendant's overbreadth challenge cannot be rendered moot by narrowing the statute after the conduct for which he has been indicted occurred. . . ."[11] In addition, as the U.S. Supreme Court explained in *Secretary of State of Maryland v. J.H. Munson Co.*:[12]

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[9] *Rose v. Council for Better Educ., Inc.*, Ky., 790 S.W.2d 186, 209 (1989). *See also Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 178, 2 L. Ed. 60, 73 (1803) ("It is emphatically the province and duty of the judicial department to say what the law is.").

[10] 491 U.S. 576, 109 S. Ct. 2633, 105 L. Ed. 2d 493 (1989).

[11] *Id.* at 585-86, 591 n.1, 109 S. Ct. at 2639, 2642 n.1, 105 L. Ed. 2d at 503, 506 n. 1 (Scalia, J., concurring in part and dissenting in part) (Brennan, J., dissenting). *See also Bigelow v. Virginia*, 421 U.S. 809, 815-16, 95 S. Ct. 2222, 2229, 44 L. Ed. 2d 600, 608 (1975) ("This Court often has recognized that a defendant's standing to challenge a statute on First Amendment grounds as facially overbroad does not depend upon whether his own activity is shown to be constitutionally privileged. The Court consistently has permitted 'attacks on overly broad statutes with no requirement that the person making the attack demonstrate that his own conduct could not be regulated by a statute drawn with the requisite narrow specificity.' ") (quoting *Dombrowski v. Pfister*, 380 U.S. 479, 486, 85 S. Ct. 1116, 1121, 14 L. Ed. 2d 22, 28 (1965)).

[12] 467 U.S. 947, 104 S. Ct. 2839, 81 L. Ed 2d 786 (1984).

> The requirement that a statute be "substantially overbroad" before it will be struck down on its face is a "standing" question only to the extent that if the plaintiff does not prevail on the merits of its facial challenge and cannot demonstrate that, as applied to it, the statute is unconstitutional, it has not [sic] "standing" to allege that, as applied to others, the statute might be unconstitutional.[13]

To avoid exposing the appellees to an *ex post facto* law, we must consider the pre-1996 version of the law, without contemplating the law's prospective application.[14] We need not consider in this appeal the constitutionality of the law as amended after the indictments of the appellees.

III. WHETHER THE DEFINITIONS OF "CONTRIBUTION" AND "INDEPENDENT EXPENDITURE" IN KENTUCKY'S CAMPAIGN FINANCE LAW ARE UNCONSTITUTIONALLY OVERBROAD

The Commonwealth claims that the circuit court erred in considering whether the statutes defining "contribution" and "independent expenditure" are unconstitutionally

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[13] *Id.* at 959, 104 S. Ct. at 2848, 81 L. Ed. 2d at 797 (citing *Parker v. Levy*, 417 U.S. 733, 760, 94 S. Ct. 2547, 2563, 41 L. Ed. 2d 439, 460 (1974); *United States v. Raines*, 362 U.S. 17, 21, 80 S. Ct. 519, 522, 4 L. Ed. 2d 524, 529 (1960)).

[14] *See Commonwealth v. Foley*, Ky., 798 S.W.2d 947, 948-49 (1990) ("The statute must be tested on the basis of what is said rather than what might have been said.") (citing *Coates v. Cincinnati*, 402 U.S. 611, 91 S. Ct. 1686, 29 L. Ed. 2d 214 (1971); *Musselman v. Commonwealth*, Ky., 705 S.W.2d 476, 478 (1986)).

overbroad. The Commonwealth asserts that the ability of a person to obtain an advisory opinion from the Kentucky Registry of Finance cures any potential facial overbreadth by permitting anyone to request a clarification of the election laws.

A. AVAILABILITY OF AN ADVISORY OPINION

Under KRS 121.135, an individual can request an advisory opinion from the Kentucky Registry of Finance. Within thirty days of the request, the Registry will issue an opinion.[15] The statute also applies to candidates and requires the Registry to release an advisory opinion within a shorter period of time – twenty days.[16]

In order to provide a safe harbor for recipients of an advisory opinion, the statute provides:

> (a) Any advisory opinion rendered by the registry under subsection (1) or (2) of this section may be relied upon only by the person or committee involved in the specific transaction or activity with respect to which the advisory opinion is rendered.
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> (b) Notwithstanding any other provision of law, any person or committee to whom a written advisory opinion has been rendered who relies upon any provision or finding of the advisory opinion and who acts in good faith in accordance with the provisions and findings of the advisory opinion

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[15] KRS 121.135(1).

[16] KRS 121.135(2).

> shall not, as a result of any act with respect to a transaction or activity addressed by the advisory opinion, be subject to any sanction provided by this chapter or any administrative regulation promulgated by the registry.[17]

Relying on this statute, the Commonwealth asserts that the appellees could have obtained an advisory opinion if they were concerned about the legality of their conduct.

While the appellees would have been able to avail themselves of the safe harbor if they had sought an advisory opinion, we believe that the advisory opinion mechanism cannot cure constitutional infirmities.[18] In addition, as the U.S. Supreme Court has recognized:

> [A] defendant's standing to challenge a statute on First Amendment grounds as facially overbroad does not depend upon whether his own activity is shown to be constitutionally privileged. The Court consistently has permitted 'attacks on overly broad statutes with no requirement that the person making the attack demonstrate that his own conduct could not be regulated by a statute drawn with the requisite narrow specificity.'"[19]

Thus, we must determine if the statutes as the circuit court concluded, violate any constitutional provision.

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[17] KRS 121.135(4).

[18] *Supra* n. 9 and accompanying text.

[19] *Bigelow v. Virginia*, 421 U.S. 809, 815, 95 S. Ct. 2222, 2229, 44 L. Ed. 2d 600, 608 (1975) (quoting *Dombrowski v. Pfister*, 380 U.S. 479, 486, 85 S. Ct. 1116, 1121, 14 L. Ed. 2d 22, 28 (1965)).

B. WHETHER KRS 121.015(6) AND 121.150(1) ARE UNCONSTITUTIONALITY OVERBROAD

Even if we do consider the constitutionality of the statutes, the Commonwealth maintains that we should consider whether the definitions of "contribution" and "independent expenditure" are substantially overbroad before invalidating the statutes. The appellees respond that any statute attempting to regulate independent political activity cannot be upheld unless "it advances a compelling state interest, and is narrowly tailored to serve that interest," quoting *Eu v. San Francisco County Democratic Central Committee*.[20]

In *Colten v. Commonwealth*,[21] Kentucky's highest court noted that "[o]verbreadth is claimed to exist in that the statute employs means that stifle or chill the exercise of constitutionally protected freedoms when the end could be more narrowly achieved."[22] "A challenge to a statute on the basis that it is overbroad is essentially an argument that in an effort to control impermissible conduct, the statute also prohibits conduct which is constitutionally permissible."[23] As we have noted, "[i]t has been held that if

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[20] 489 U.S. 214, 222, 109 S. Ct. 1013, 1019, 103 L. Ed. 2d 271, 281 (1989) (internal citations omitted).

[21] Ky., 467 S.W.2d 374 (1971).

[22] *Id.* at 377 (citing *Shelton v. Tucker*, 364 U.S. 479, 81 S. Ct. 247, 5 L. Ed. 2d 231 (1960); *Zwickler v. Koota*, 389 U.S. 241, 88 S. Ct. 391, 19 L. Ed. 2d 44 (1967); *Griswold v. Connecticut*, 381 U.S. 479, 85 S. Ct. 1678, 14 L. Ed. 2d 510 (1965)).

[23] *Commonwealth v. Ashcraft*, Ky. App., 691 S.W.2d 229, 232 (1985) (citing *Hoffman Estates v. Flipside, Hoffman Estates*, 455 U.S. 489, 102 S. Ct. 1186, 71 L. Ed. 2d 362 (1982)). *See also Thornhill v. Alabama*,

(Continued on following page)

an enactment does not reach a substantial amount of constitutionally protected conduct, then the overbreadth challenge must fail."[24] In addition, "[b]ecause the overbreadth doctrine allows challenges from one whose own conduct may be clearly unprotected, that doctrine has been used only as a last resort by the federal courts."[25]

The seminal case on the issue of campaign finance and free speech is *Buckley v. Valeo*.[26] In that case, the U.S. Supreme Court considered a challenge to the constitutionality of the Federal Election Campaign Act. In particular, the Court addressed whether the regulation of contributions and independent expenditures violated individuals' and organizations' right to free speech. The Court upheld a federal law that regulated the amount of contributions because it found that "Congress could legitimately conclude that the avoidance of the appearance of improper influence 'is also critical . . . if confidence in the system of

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310 U.S. 88, 97, 60 S. Ct. 736, 742, 84 L. Ed. 1093, ___ (1940) (A law is facially void if it "does not aim specifically at evils within the allowable area of State control but . . . sweeps within its ambit other activities that in ordinary circumstances constitute an exercise of freedom of speech. . . .").

[24] *Ashcraft, supra*, n. 23, at 232 (citing *Hoffman Estates*, 455 U.S. at 494, 102 S. Ct. at 1191, 71 L. Ed. 2d at 369; *New York v. Ferber*, 458 U.S. 747, 767, 102 S. Ct. 3348, 3361, 73 L. Ed. 2d 1113, 1129 (1982)).

[25] *Id.* at 232-33 (*Ferber*, 458 U.S. at 769, 102 S. Ct. at 3361, 73 L. Ed. 2d at 1130).

[26] 424 U.S. 1, 96 S. Ct. 612, 46 L. Ed. 2d 659 (1976) (per curiam).

representative Government is not to be eroded to a disastrous extent.'"[27] Regarding contributions, the Court said:

> [A] limitation upon the amount that any one person or group may contribute to a candidate or political committee entails only a marginal restriction upon the contributor's ability to engage in free communication. A contribution serves as a general expression of support for the candidate and his views, but does not communicate the underlying basis for the support. * * * A limitation on the amount of money a person may give a candidate or campaign organization thus involves little direct restraint on his political communication, for it permits the symbolic expression of support evidenced by the contribution but does not in any way infringe the contributor's freedom to discuss candidates and issues. While contributions may result in political expression if spent by a candidate or an association to present views to the voters, the transformation of

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[27] *Id.* at 29, 96 S. Ct. at 639, 46 L. Ed. 2d at 692 (quoting *United States Civil Serv. Comm'n v. National Ass'n of Letter Carriers*, 413 U.S. 548, 565, 93 S. Ct. 2880, 2890, 37 L. Ed. 2d 796, 809 (1973)). *See also Parker v. Levy*, 417 U.S. 733, 760, 94 S. Ct. 2547, 2563, 41 L. Ed. 2d 439, 460 (1974) ("This Court has . . . repeatedly expressed its reluctance to strike down a statute on its face where there were a substantial number of situations to which it might be validly applied. Thus even if there are marginal applications in which a statute would infringe on First Amendment values, facial invalidation is inappropriate if the 'remainder of the statute . . . covers a whole range of easily identifiable and constitutionally proscribable . . . conduct. . . .'") (quoting *National Ass'n of Letter Carriers*, 413 U.S. 580-81, 93 S. Ct. at 2898, 37 L. Ed. 2d at 817).

> contributions into political debate involves speech by someone other than the contributor.[28]

In its most recent application of *Buckley*, the Court considered the constitutionality of state campaign contribution limitations in *Nixon v. Shrink Missouri Government PAC*.[29] In *Nixon*, the Court upheld a state's right to adopt "comparable state regulation[s]" pursuant to *Buckley*.[30]

Applying these principles to this case, we first must consider whether the definition of "contribution" in KRS 121.015 is overbroad. At the time of the alleged acts, KRS 121.015, in relevant part, provided that:

> (6) "Contribution" means any:
>
> > (a) Payment, distribution, loan, deposit, or gift of money or other thing of value, to a candidate, his agent, a slate of candidates, its authorized agent, a committee, or contributing organization. As used in this subsection, "loan" shall include a guarantee, endorsement, or other form of security where the risk of nonpayment rests with the surety, guarantor, or endorser, as well as with a committee, contributing organization, candidate, slate of candidates, or other primary obligor. No person shall become liable as surety, endorser, or guarantor for any sum in any one (1) election which, when

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[28] *Buckley, supra*, n. 26, at 20-21, 96 S. Ct. at 635-36, 46 L. Ed. 2d at 688-89.

[29] 528 U.S. 377, 120 S. Ct. 897, 145 L. Ed. 2d 886 (2000).

[30] *Id.* at ___, 120 S. Ct. at 901, 145 L. Ed. 2d at 895.

combined with all other contributions the individual makes to a candidate, his agent, a slate of candidates, its agent, a committee, or a contributing organization, exceeds the contribution limits provided in KRS 121A.050 or KRS 121.150;

(b) Payment by any person other than the candidate, his authorized treasurer, a slate of candidates, its authorized treasurer, a committee, or a contributing organization, of compensation for the personal services of another person which are rendered to a candidate, slate of candidates, committee, or contributing organization, or for inauguration activities;

(c) Goods, advertising, or services with a value of more than one hundred dollars ($100) in the aggregate in any one (1) election which are furnished to a candidate, slate of candidates, committee, or contributing organization or for inauguration activities without charge, or at a rate which is less than the rate normally charged for the goods or services;

(d) Payment by any person other than a candidate, his authorized treasurer, a slate of candidates, its authorized treasurer, a committee, or contributing organization for any goods or services with a value of more than one hundred dollars ($100) in the aggregate in any one (1) election which are utilized by a candidate, slate of candidates, committee, or contributing organization, or for inauguration activities; or

> (e) Expenditure in connection with any other activity undertaken independently of the activities of a candidate, slate of candidates, committee, or contributing organization made or furnished for the purpose of influencing the results of an election;
>
> (7) Notwithstanding the foregoing meanings of "contribution," the word shall not be construed to include:
>
> (a) Services provided without compensation by individuals volunteering a portion or all of their time on behalf of a candidate, committee, or contributing organization; or
>
> (b) A loan of money by any financial institution doing business in Kentucky made in accordance with applicable banking laws and regulations and in the ordinary course of business[.][31]

In reaching its conclusion that the definition of "contribution" is unconstitutional, the circuit court simply found that the definition did not permit constitutionally protected political activities.

In *Hendricks v. Commonwealth*,[32] the Kentucky Supreme Court noted that the U.S. Supreme Court has recognized that "almost any law could be applied in such a way as to infringe upon some form of protected speech or conduct" and that "[t]his potential application and extreme application of laws [must be] halted by [] [courts]."[33]

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[31] KRS 121.015(6)-(7).

[32] Ky., 865 S.W.2d 332 (1993).

[33] *Id.* at 337 (citing *Broadrick v. Oklahoma*, 413 U.S. 601, 93 S. Ct. 2908, 37 L. Ed. 2d 830 (1973)).

Stated a different way, it would be impossible for the General Assembly to draft a statute that would specifically address all circumstances. As a result, it was necessary to use imprecise language.[34] When a law, such as the one in this case, is challenged as being unconstitutional, we must not be led astray to accept unreasonable interpretations of the statutes.

The definition of contribution in this case is consistent with the constitutional standards articulated in *Buckley*. The law regulates the amount of contributions when the slate of candidates elects to receive public financing, thus requiring the candidates to obtain funding from a greater number of sources. However, the *Buckley* court specifically sanctioned this type of restriction on free speech. Like the Federal Election Campaign Act at issue in *Buckley*, the overall effect of the limitation on contributions in Kentucky's law

> is merely to require candidates political committees to raise funds from a greater number of persons and to compel people who would otherwise contribute amounts greater than the statutory limits to expend such funds on direct political expression, rather than to reduce the total amount of money potentially available to promote political expression.[35]

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[34] "Because we are '[c]ondemned to the use of words, we can never expect mathematical certainty from our language.'" *Hill v. Colorado*, 530 U.S. __, ___, 120 S. Ct. 2480, 2498, 147 L. Ed. 2d 597, 622 (2000) (quoting *Grayned v. City of Rockford*, 408 U.S. 104, 110, 92 S. Ct. 2294, 33 L. Ed. 2d 222 (1972).

[35] *Buckley*, 424 U.S. at 22, 96 S. Ct. at 636, 46 L. Ed. 2d at 689.

In *Nixon*, the U.S. Supreme Court noted that states have a legitimate interest in preventing both actual and apparent corruption by regulating campaign contributions.[36]

In addition, an important distinction between this case and *Buckley* and *Nixon* is that the 1995 Patton/Henry campaign elected to accept state funding, thereby imposing the contribution limitations upon their campaign; the provisions of the law at issue do not unilaterally apply to all campaigns. Because the appellees have failed to persuade us that the definition of "contribution" is contrary to the Court's holding in *Buckley* and its progeny, we conclude that KRS 121.015(6) is constitutional.

Next, we examine the term "independent expenditure" as defined in KRS 121.150(1). The version of the statute in effect in 1995 provided that:

> "[I]ndependent expenditure" means one made for a communication which expressly advocates the election or defeat of a clearly identified candidate or slate of candidates, or the passage or defeat of a constitutional amendment or public question which will appear on the ballot and which is not made with any direct or indirect cooperation, consent, request, suggestion, or consultation involving a candidate, slate of candidates, campaign committee, political issues committee, or agent.

In *Buckley*, the Court also addressed legislative efforts to regulate expenditures, saying:

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[36] *Nixon*, 528 U.S. at ___, 120 S. Ct. at 905, 145 L. Ed. 2d at 900.

> A restriction on the amount of money a person or group can spend on political communication during a campaign necessarily reduces the quantity of expression by restricting the number of issues discussed, the depth of their exploration, and the size of the audience reached. This is because virtually every means of communicating ideas in today's mass society requires the expenditure of money.[37]

The Court concluded that it is within an individual's discretion to determine how much of his or her own money to spend to support his or her candidacy or another person's.[38]

In this case, the definition of "independent expenditure" prohibits the spending of money in, *inter alia*, an election in which the expenditure was "made with any direct or indirect cooperation, consent, request, suggestion, or consultation involving a candidate, slate of candidates, campaign committee, political issues committee, or agent."[39] From this language, and with the underlying premise of the law in mind – preventing actual and apparent corruption, it is clear that the General Assembly attempted to prohibit the coordination of expenditures

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[37] *Buckley*, 424 U.S. at 19, 96 S. Ct. at 634-35, 46 L. Ed. 2d at 687-88 (footnote omitted).

[38] *Id.* at 18, 96 S. Ct. at 634, 46 L. Ed. 2d at 687 ("[I]t is beyond dispute that the interest in regulating the alleged 'conduct' of giving or spending money 'arises in some measure because the communication alleged integral to the conduct is itself thought to be harmful.'") (quoting *United States v. O'Brien*, 391 U.S. 367, 382, 88 S. Ct. 1673, 1682, 20 L. Ed. 2d 672, 683 (1968)).

[39] KRS 121.150(1).

with a campaign in order to circumvent the limitations on contributions.[40] As the U.S. Court of Appeals for the Fourth Circuit observed in *Adventure Communications, Inc. v. Kentucky Registry of Election Finance*,[41] "[d]uring the past decade, the Commonwealth of Kentucky has suffered a number of high-profile political campaign scandals, culminating in the indictment of various public officials and lobbyists. In 1992, in an effort to curb further corruption, Kentucky passed extensive campaign finance reform legislation. . . ."[42]

Kentucky's campaign finance law allows independent expenditures. In defining the term "independent expenditure," the General Assembly has simply outlawed

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[40] *See Buckley*, 424 U.S. at 26-27, 96 S. Ct. at 638, 46 L. Ed. 2d at 692. As the *Buckley* Court noted:

> Under a system of private financing of elections, a candidate lacking immense personal or family wealth must depend on financial contributions from others to provide the resources necessary to conduct a successful campaign. The increasing importance of the communications media and sophisticated mass-mailing and polling operations to effective campaigning make the raising of large sums of money an ever more essential ingredient of an effective candidacy. To the extent that large contributions are given to secure a political *quid pro quo* from current and potential office holders, the integrity of our system of democracy is undermined.

[41] 191 F.3d 429 (4th Cir. 1999).

[42] *Id.* at 432. To the same effect, *see Kentucky Right to Life, Inc. v. Terry*, 108 F.3d 637, 639 (1997). *See also Nixon*, 528 U.S. at __, 120 S. Ct. at 905, 145 L. Ed. 2d at 900 ("In defending its own statute, Missouri espouses those same interests of preventing corruption and the appearance of its [sic] that flows from munificent campaign contributions. Even without the authority of *Buckley*, there would be no serious question about the legitimacy of the interests claimed, which, after all, underlie bribery and anti-gratuity statutes.").

contributions that a contributor alleges are independent expenditures, but which in fact, are not. We are unpersuaded that the definition in KRS 121.150(1) impinges on constitutionally protected activity. Contrary to the appellees' suggestion, the statute does not prohibit individuals or organizations from communicating with a campaign. Rather, in enacting the law, the legislature attempted to prevent circumvention of the restriction on contributions after a slate, like the 1995 Patton/Henry slate, elects to accept state funds for running its campaign.

In concluding that the statutes are constitutional, we are only addressing whether the statutes are constitutional as applied to the appellees. We decline to address whether the statutes would be constitutional in all circumstances because

> [e]mbedded in the traditional rules governing constitutional adjudication is the principle that a person to whom a statute may constitutionally be applied will not be heard to challenge that statute on the ground that it may conceivably be applied unconstitutionally to others, in other situations not before the Court.[43]

IV. WHETHER THE DEFINITION OF THE TERM "KNOWINGLY" IS UNCONSTITUTIONALLY VAGUE

The Commonwealth also asserts that the circuit court erred in concluding that the definition of "knowingly" in

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[43] *Broadrick v. Oklahoma*, 413 U.S. 601, 610, 93 S. Ct. 2908, 2915, 37 L. Ed. 2d 830, 839 (1973) (citations omitted).

KRS 121.015(10) is unconstitutionally vague. The Commonwealth believes that the appellees clearly knew that the statutes applied to their conduct.

A basic legal premise is that "criminal statutes must be sufficiently specific that an individual has fair notice of what conduct is forbidden."[44] Under the void-for-vagueness doctrine, "a penal statute [must] define the criminal offense with sufficient definiteness that ordinary people can understand what conduct is prohibited and in a manner that does not encourage arbitrary and discriminatory enforcement."[45] As we noted in *Commonwealth v. Kash*:

> To assert a facial challenge to a statute as impermissibly vague, a complainant must show that the statute is vague "not in the sense that it requires a person to conform his conduct to an imprecise but comprehensible normative standard, but rather in the sense that no standard of conduct is specified at all." Simply because a criminal statute could have been written more precisely does not mean the statute as written is unconstitutionally vague. Moreover, the United States Supreme Court has consistently held that a person to whose conduct a statute clearly

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[44] *Commonwealth v. Kash*, Ky. App., 967 S.W.2d 37, 43 (1997) (citing *United States v. Harriss*, 347 U.S. 612, 74 S. Ct. 808, 98 L. Ed. 989 (1954)).

[45] *Kolender v. Lawson*, 461 U.S. 352, 357, 103 S. Ct. 1855, 1858, 75 L. Ed. 2d 903, 909 (1983). *See also Foley*, 798 S.W.2d at 951; *Hardin v. Commonwealth*, Ky., 573 S.W.2d 657, 660 (1978); *Kash*, 967 S.W.2d at 43 (quoting *Kolender*).

> applies cannot "successfully challenge it for vagueness" as applied to the conduct of others.[46]

In considering whether the statutes are unconstitutionally vague, we must keep basic principles of statutory construction at the forefront. We must carry out the intent of the legislature.[47] In doing so, we must consider "the purpose which the statute is intended to accomplish – the reason and spirit of the statute – the mischief intended to be remedied."[48] We should reject any statutory construction that is "unreasonable, and absurd, in preference for one that is 'reasonable, rational, sensible and intelligent'. . . . "[49] As the Supreme Court noted in *Diemer v. Commonwealth, Transportation Cabinet*[50] regarding the function of courts:

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[46] *Commonwealth v. Kash, supra*, n. 44, at 43 (internal citations omitted).

[47] *See Reed v. Greene*, Ky., 243 S.W.2d 892, 893 (1951) ("The primary purpose of judicial construction of statutes is to determine the intent and purpose thereof. . . . ") (citing *City of Mayfield v. Reed*, 278 Ky. 5, 127 S.W.2d 847 (1939); *Gilbert v. Greene*, 185 Ky. 817, 216 S.W. 105 (1919)); *Hardin County Fiscal Court v. Hardin County Bd. of Health*, Ky. App., 899 S.W.2d 859, 861 (1995) ("The rules of statutory construction require that we construe this statute to carry out the intent of the legislature.") (citing KRS 446.080). *See also* KRS 446.080(1) ("All statutes of this state shall be liberally construed with a view to promote their objects and carry out the intent of the legislature. . . . ").

[48] *City of Louisville v. Helman*, Ky., 253 S.W.2d 598, 600 (1952) (citations omitted).

[49] *Johnson v. Frankfort & Cincinnati R.R.*, 303 Ky. 256, 197 S.W.2d 432, 434 (1946) (citation omitted).

[50] Ky., 786 S.W.2d 861 (1990), superseded by statute according to *Commonwealth, Transp. Cabinet v. Wayfara, Inc.*, Ky. App., 840 S.W.2d 211 (1992).

> It is our responsibility to read the statutes of the General Assembly so as to save their constitutionality whenever such can be done consistent with reason and common sense, although we cannot go so far as to add additional words to give constitutionally permissible meaning where none would otherwise exist.[51]

As we noted in *Kash*, "under the doctrine of *in pari materia*, statutes having a common purpose or subject matter must be construed together."[52]

We must then apply these basic principles to the statute involved. At the time of the alleged acts, KRS 121.015(10) provided that "'[k]nowingly' means, with respect to conduct or to a circumstance described by a statute defining an offense, that a person is aware or should have been aware that his conduct is of that nature or that the circumstance exists. . . ."

The appellees focus their argument against the KRS 121.015(10)'s constitutionality on the definition's language of "should have been aware." However, the indictment charges that the appellees knowingly engaged in prohibited acts; it does not state that they "should have been aware." Accordingly, we must only consider whether the definition of "knowingly," as applied to the appellees in these specific circumstances, is constitutional.

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[51] *Id.* at 863-64 (internal citations omitted).

[52] *Kash, supra*, n. 44, at 44 (citing *Dieruf v. Louisville & Jefferson County Bd. of Health*, 304 Ky. 207, 200 S.W.2d 300, 302 (1947); *Hardin County Fiscal Court*, 899 S.W.2d at 862).

The appellees had fair warning that the activities in which they allegedly engaged were illegal. They were experienced political operatives who knew that the Patton/Henry campaign had elected to receive state funding; they were certainly not novices in the political arena. We believe that the appellees could determine, with reasonable certainty, whether their actions were illegal.

From the language of the statute, it is clear that the General Assembly did not intend to create penalties for unintentional violations of the law, thus preventing arbitrary and discriminatory enforcement. As we said in *Kash*, "the statute encompasses only conduct which is engaged in 'knowingly' . . . ; inadvertence or ignorance will not suffice. This scienter requirement further restricts the range of conduct susceptible to prosecution."[53] The term "knowingly" is found in three sections of the Kentucky Constitution and numerous state statutes, and this term is heavily utilized in Kentucky jurisprudence. Thus, we conclude that the term "knowingly" as defined in KRS 121.015(10) is not unconstitutionally vague.

V. CONCLUSION

Because we have determined that the circuit court erred in concluding that KRS 121.015(6), 121.015(10), and 121.150(1) are unconstitutional, it is unnecessary for us to address the Commonwealth's additional arguments. Accordingly, we reverse the order declaring Kentucky's campaign

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[53] *Kash, supra*, n. 44, at 45. *See also Hill v. Colorado, supra*, n. 33, at ___, 120 S. Ct. at 2495, 147 L. Ed. 2d at 622.

finance law unconstitutional and dismissing the indictments against the appellees, and we remand this case to Franklin Circuit Court for further proceedings.

SCHRODER, Judge, CONCURS.

McANULTY, Judge, DISSENTS BY SEPARATE OPINION.

McANULTY, JUDGE, DISSENTING: Respectfully, I dissent. I disagree with the majority as to the constitutionality of the statutes at issue. I believe the trial court correctly held that the definitions in the statutes are vague and overbroad. Furthermore, I believe they impinge on the First Amendment rights of freedom of speech and freedom of association in a direct and impermissible manner.

The majority opinion discusses the propriety of regulation of campaigns generally, without attention to the operation of the particular provisions in this case. Moreover, the majority refuses to consider possible interpretations of the statute, reasonable or unreasonable, which might result from its "imprecise language." The majority seems only to consider the question answered long ago in *Buckley v. Valeo*: whether the legislature can regulate expenditures for a political campaign. However, our task in this case is to determine the constitutionality of the manner in which the Kentucky General Assembly has attempted to regulate publically financed campaigns. The contribution and independent expenditure limitations of the Kentucky election statutes at issue concern "an area of the most fundamental First Amendment activities." *Buckley v. Valeo*, 424 U.S. 1, 14, 96 S. Ct. 612, 632, 46 L. Ed. 2d 659, 685 (1976). A major purpose of the First

Amendment was to protect the free discussion of governmental affairs, including the discussions of candidates. *Id.* Furthermore, the First Amendment protects the right of political association as well as political expression. 424 U.S. at 15, 96 S. Ct. at 632, 46 L. Ed. 2d at 685.

In an effort to control impermissible conduct, the statutes at issue, by operation of the definitions of the key terms in KRS Chapter 121, effectively prohibit conduct which is constitutionally permissible. *See Commonwealth v. Ashcraft*, Ky. App., 691 S.W.2d 229, 232 (1985). As such, the statutes are overbroad. *See id.*; *Commonwealth v. Foley*, Ky., 798 S.W.2d 947, 952 (1990). The statutes do more than address "coordination," as the majority asserts, but also sweep within their scope conduct and communications which constitute protected speech.

Additionally, I believe the statutes do not withstand the test for vagueness set out in *Foley*, 798 S.W.2d at 951, which is "whether a person disposed to obey the law could determine with reasonable certainty from the language used whether contemplated conduct would amount to a violation." Under the operative definitions of "contribution" and "independent expenditure" in the 1995 Kentucky election statutes, there is a gray area in which the question of whether one's conduct is a violation of law is anybody's guess. It remains unclear what communication between a campaign and its supporters is permissible and what is prohibited.

The essential problem with the lack of precision is the fact that these are statutes which curtail political speech. The statute at issue here does even more than regulate contribution amounts, as the legislation in *Buckley* and *Nixon* did. Instead, the public financing statutes at issue

in this case directly limit speech and association. State action which may have the effect of curtailing first amendment freedoms is subject to the closest scrutiny. *NAACP v. Alabama ex rel. Patterson*, 357 U.S. 449, 460-461, 2 L. Ed. 2d 1488, 78 S. Ct. 1163 (1958). "[T]he government may regulate the exercise of the protected right of political associations when it is demonstrated, by the government, that a sufficiently important interest exists and there is employed a narrowly drawn means which avoids unnecessary abridgement of associational rights." *Buckley*, 424 U.S. at 25, 96 S. Ct. at 638, 46 L. Ed. 2d at 691, *cited by Associated Indus. of Kentucky v. Commonwealth*, Ky., 912 S.W.2d 947, 952-953 (1995). I believe the Commonwealth has shown that a compelling interest exists in establishing a public financing system and thereafter ensuring that those who accept public financing and spending limits do not abuse the system by evading the limits. However, these statutes are not the least restrictive means of accomplishing that purpose. In my humble opinion, they impermissibly burden the rights of freedom of expression and of association. As such, they are unconstitutional. I would affirm the order of the court below.

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COMMONWEALTH OF KENTUCKY
48TH JUDICIAL CIRCUIT
FRANKLIN CIRCUIT COURT
DIVISION I
CASE NUMBERS 98-CR-00136-001
98-CR-00136-002
98-CR-00136-003
98-CR-00136-004

COMMONWEALTH OF KENTUCKY PLAINTIFF

VS. ORDER DISMISSING INDICTMENTS

ANDREW J. "SKIPPER" MARTIN,
DANNY ROSS,
LON FIELDS,
ROBERT WINSTEAD DEFENDANTS

* * *

This matter is before the Court on two Motions to Dismiss filed by the Defendants. The first Motion to Dismiss is for irregularities in the Grand Jury proceeding. The second Motion to Dismiss alleges that K.R.S. 150.150(1); K.R.S. 121.150(12); K.R.S. 121.056(1), and; K.R.S. 121A.050(1) are unconstitutional because of the definitions of "contribution", "independent expenditure", and "knowingly" are overbroad and vague as used in the named Statutes. This Court has reviewed the Memoranda of the parties and the case law relevant thereto and concludes that the Motion to Dismiss for Grand Jury irregularities should be overruled, however, the Motion to Dismiss the Indictment as the above-named Statutes are unconstitutional should be sustained.

As to the Defendants first Motion, the Court finds that although the statements made to the Grand Jury by Mr. Handy and Mr. Forgy were certainly objectionable,

this Court is of the opinion that any prejudice to the Defendants was cured by the admonition given to the Grand Jury by Circuit Judge William Graham. Judge Graham directed the Special Grand Jury to disregard the statements and advice given to them by the witnesses, and this Court must assume that the Grand Jury heeded that admonishment before returning their Indictments.

This Court does find that the definitions of "contribution" and "independent expenditure" are overbroad, and as the Statutes referred to in the Indictment are all dependent on these definitions, the Court finds that those Statutes are all constitutionally infirm. The Court further finds that the definition of "knowingly" as set forth in K.R.S. 121.015(10) is unconstitutionally vague.

The Defendants were indicted under the 1995 version of the above-named Statutes. In 1996 the Kentucky Legislature amended the definitions of "contribution" and "independent expenditure" to conform to constitutionally required standards.

The case of *Buckley v. Valeo*, 424 U.S. 14, 96 S.Ct. at 632 and its progeny direct that Legislatures must be careful not to invade the First Amendment rights of individuals who wish to spend money on behalf of their own free speech in supporting political candidates. It is clear to this Court that the definitions of "contribution" and "independent expenditure" as set forth in the Kentucky Election Laws of 1995 do not permit political activity protected by the First Amendment and are therefore unconstitutionally overbroad.

The final argument by the Defendants is that the definition of "knowingly" contained in K.R.S. 121.015 is unconstitutionally vague. The Statute provides:

> "Knowingly" means, with respect to conduct or to a circumstance described by a Statute defining an offense that a person is aware or should have been aware that his conduct is of that nature or that the circumstance exist;"

The Defendants argue that the Commonwealth must prove specific intent by a Defendant to violate the law, and that the language in the definition, "aware or should have been aware", is unconstitutionally vague as it provides a negligence standard for criminal activity. The Commonwealth, in response, claims that the Defendants cannot complain of the definition of "knowingly" as it is the Commonwealth's opinion that the Defendants were aware that they were violating the Election Law Statutes. However, the Indictments in this action simply used the term "knowingly" in reference to each Count of the Indictment. This Court finds that the statutory definition of "knowingly" is unconstitutional as it is unduly vague in that no specific intent by the Defendants is required by the Statute to prove any criminal conduct on behalf of the Defendants.

For the foregoing reasons IT IS HEREBY ORDERED that the Indictments for each of the above-named Defendants are hereby dismissed.

This is final a final and appealable order there being no just cause for delay.

THIS the 3rd day of June, 1999.

/s/ William W. Trude, Jr.
WILLIAM W. TRUDE, JR.,
SPECIAL JUDGE
FRANKLIN CIRCUIT COURT

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§ 121.015. Definitions for chapter.

As used in this chapter:

* * *

(6) "Contribution" means any:

* * *

(e) Expenditure in connection with any other activity undertaken independently of the activities of a candidate, slate of candidates, committee, or contributing organization made or furnished for the purpose of influencing the results of an election;

* * *

(10) "Knowingly" means, with respect to conduct or to a circumstance described by a statute defining an offense, that a person is aware or should have been aware that his conduct is of that nature or that the circumstance exists; and

* * *

---

§ 121.150. Campaign contribution and loan restrictions and expenditure limitations.

(1) No contribution of money or other thing of value, nor obligation therefor, shall be made or received, and no expenditure of money or other thing of value shall be made or incurred, directly or indirectly, other than an "independent expenditure," to support inauguration activities or to support or defeat a candidate, slate of candidates, constitutional amendment, or public question which will appear on the ballot in an election, except through the duly appointed campaign manager, or campaign treasurer of the candidate, slate of candidates, or registered committee. As used in this section, "independent expenditure"

means one made for a communication which expressly advocates the election or defeat of a clearly identified candidate or slate of candidates, or the passage or defeat of a constitutional amendment or public question which will appear on the ballot and which is not made with any direct or indirect cooperation, consent, request, suggestion, or consultation involving a candidate, slate of candidates, campaign committee, political issues committee, or agent. No candidate, slate of candidates, campaign committee, political issues committee, nor anyone acting on their behalf shall have any communication with another person nor anyone on his behalf regarding that person's making of an independent expenditure on behalf of the candidate, slate, or committee prior to the time the independent expenditure is made. Any person making an "independent expenditure," as defined in this subsection, shall report these expenditures when the expenditures exceed five hundred dollars ($500) in the aggregate in any one (1) election, on a form provided by the registry and shall sign a statement on the form, under penalty of perjury, that the expenditure was an actual independent expenditure and that there was no prior communication with the campaign on whose behalf it was made.

* * *

INDICTMENT

FRANKLIN CIRCUIT COURT
CRIMINAL DIVISION

RCr 6.06, 6.08, 6.10

INDICTMENT NO. 98-CR 00136

SPECIAL GRAND JURY TERM 1998
COMMONWEALTH OF KENTUCKY

VS.

ANDREW J. "SKIPPER" MARTIN
DANNY ROSS
LON FIELDS
ROBERT WINSTEAD

Count I – Campaign Contribution and Loan Restrictions and Expenditure Limitations, KRS 121.150(1), Class D Felony, one to five years, Complicity, KRS 502.020 (All)

Count II – Campaign Contribution and Loan Restrictions and Expenditure Limitations, KRS 121.150(12), Class D Felony, one to five years, Complicity, KRS 502.020 (All)

Count III – Restrictions upon Specified Campaign Contributors, KRS 121.056(1), Class D Felony, one to five years, Complicity, KRS 502.020 (All)

Count IV – Restrictions upon Campaign Contributors, KRS 121.150(1), Class D Felony, one to five years, Complicity, KRS 502.020 (Martin/Ross only)

Count V – Conspiracy to Violate Contribution Limits, KRS 506.040; KRS 121A.050(1), Class D Felony, one to five years, (All)

(Filed Sep. 24, 1998)

THE GRAND JURORS OF THE SPECIAL FRANKLIN COUNTY GRAND JURY IN THE NAME AND BY THE AUTHORITY OF THE COMMONWEALTH OF KENTUCKY CHARGE:

COUNT I

On or between the 1st day of June, 1995 and continuing until the 12th day of December, 1995 in Franklin County, Kentucky, the above-named Defendants, Andrew J. "Skipper" Martin, Danny Ross, Lon Fields, and Robert Winstead acting alone and in complicity with others committed the offense of knowingly making or receiving a contribution of a thing of value which was neither an independent expenditure to support or defeat a candidate nor made to the duly appointed campaign manager or campaign treasurer of the Patton/Henry slate of candidates, in violation of KRS 121.150(1).

COUNT II

On or between the 1st day of June, 1995 and continuing until the 12th day of December, 1995 in Franklin County, Kentucky, the above-named Defendants, Andrew J. "Skipper" Martin, Danny Ross, Lon Fields, and Robert Winstead acting alone and in complicity with others knowingly made, a payment, distribution, loan, advance, deposit or a gift of money to another person to contribute to candidates Paul Patton and Steve Henry or anyone on

their behalf or knowingly accepted a contribution made by one person who has received a payment, distribution, loan, advance, deposit or a gift of money from another to contribute to candidates Paul Patton and Steve Henry or anyone on their behalf, in violation of KRS 121.150(12).

COUNT III

On or between the 1st day of June, 1995 and the 31st day of March, 1996 in Franklin County, Kentucky, the above-named Defendants, Andrew J. "Skipper" Martin, Danny Ross, Lon Fields, and Robert Winstead acting alone and in complicity with others knowingly participated in arranging or obtaining an appointive position in violation of KRS 121.056(1).

COUNT IV

On or between the 1st day of October, 1995 and continuing until the 7th day of November, 1995 in Franklin County, Kentucky, the above-named Defendants, Andrew J. "Skipper" Martin and Danny Ross, acting alone and in complicity with others knowingly made or received a contribution of a thing of value which was neither an independent expenditure to support or defeat a candidate nor made to the duly appointed campaign manager or campaign treasurer of the Patton/Henry slate of candidates, in violation of KRS 121.150(1).

COUNT V

On or between the 1st day of January, 1995 and continuing until the 12th day of December, 1995 in Franklin County, Kentucky, the above-named Defendants, Andrew

J. "Skipper" Martin, Danny Ross, Lon Fields, and Robert Winstead, with the intention of promoting or facilitating the commission of a crime agreed that one or more of them would engage in conduct constituting a crime under KRS 121A.050(1) by knowingly making or receiving a contribution of more than $500 in any one election to the Patton/Henry slate of candidates after the slate had filed a statement of intent to accept transfers from the Kentucky state election campaign fund and abide by the maximum expenditure limit, which was not rescinded.

ALL AGAINST THE PEACE AND DIGNITY OF THE COMMONWEALTH OF KENTUCKY

A True Bill
/s/ Rodney Raby
Foreperson of the Grand Jury

Witnesses:

Andrew J. "Skipper" Martin
Lon Fields
Robert Winstead
Alice McDonald
Clarence Frost
Gary Martin
Mark Stapleton
Jeff Jett
Herman Holbrook
Charles Brownd
David Sutherland

Presented by the foreperson of the grand jury to the court in the presence of the grand jury and in my presence and received by me from the court and filed in open court this 24 day of Sept., 1998.

/s/ Janice Marshall
Clerk of this Court

COMMONWEALTH OF KENTUCKY
SUPREME COURT
2001-SC-0675-D (1999-CA-1367)

ANDREW J. MARTIN, DANNY ROSS, LON FIELDS and ROBERT WINSTEAD — MOVANTS/ CROSS RESPONDENTS

RESPONDENT/ CROSS MOVANT

v.

COMMONWEALTH OF KENTUCKY

FRANKLIN CIRCUIT COURT
Nos. 1998-CR-0136-001, 1998-CR-0136-002
1998-CR-0136-003 & 1998-CR-0136-004

MOTION OF UNITED STATES SENATOR MITCH MCCONNELL FOR LEAVE TO FILE *AMICUS CURIAE* BRIEF IN SUPPORT OF MOVANTS/CROSS RESPONDENTS

* * *

Comes United States Senator Mitch McConnell ("Senator McConnell"), and files this motion for leave to file an *amicus curiae* brief in support of Movants/Cross Respondents.

This motion is timely filed pursuant to Civil Rule 76.12(7) and is not interposed for delay. Senator McConnell has a strong interest in the issues to be decided herein and the outcome of this appeal. In that regard, Senator McConnell is the senior United States Senator from the Commonwealth of Kentucky and is recognized as one of the leading experts on the legal and policy issues surrounding campaign finance regulation. He has served as Chairman of the Senate Rules and Administration Committee, which has jurisdiction over federal election law,

and currently serves as its Ranking Member. Over the years, Senator McConnell has led the opposition to federal legislative efforts at "campaign finance reform" on the ground that such legislation would violate the First Amendment. Earlier this year, he again served as floor manager in opposing the McCain-Feingold campaign finance reform bill in the United States Senate. Senator McConnell has written numerous articles on campaign finance reform, and he filed an *amicus* brief in the United States Supreme Court in *Nixon v. Shrink Missouri Government PAC*, 582 U.S. 377 (2000).

Senator McConnell's opposition to many of the measures that have been advanced under the guise of reforming our nation's campaign finance systems is informed by his quarter century in government service as an elected official at both the local and national levels. This practical experience complements his legal and legislative expertise on the subject and has reinforced his belief that the First Amendment, the nation's premier election law, must fully protect the ability of all Americans to engage in free speech and association.

Because of his convictions, Senator McConnell has defended the constitutional rights of all Americans, regardless of political stripe or personal station, to participate in American politics. In doing so, he has worked with citizens and groups across the political spectrum, from the American Civil Liberties Union to the National Right to Life Committee.

In his brief in this action, Senator McConnell offers his expertise to aid the Court in navigating the dangerous legal shoals of campaign finance jurisprudence in order to protect the rights of his constituents. This brief will

discuss the overbroad definition of "contribution" and the overly-narrow definition of "independent expenditure" in the 1995 versions of KRS 121.015(6)(E) and KRS 121.150(1), respectively, and how these definitions convert protected First Amendment free speech rights into unlawful criminal activity. Specifically, the brief will demonstrate how these definitions cause protected speech, such as that which regularly occurs between citizens and organizations and their government officials, to be unconstitutionally deemed a contribution. The brief will also focus on how these definitions, particularly the overly broad standard of coordination, unconstitutionally threaten and chill the exercise of First Amendment rights of citizens and result in intrusive government investigations. Thus, the brief is relevant to the case at bar because the Indictment which this Court must review is based upon these definitions.

WHEREFORE, Senator McConnell respectfully asks this Court to grant him leave to file, on his own behalf, the attached *Amicus Curiae* brief.

Respectfully submitted,

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CERTIFICATE OF SERVICE

It is hereby certified that a copy of the foregoing was served by U.S. Mail, postage prepaid on this 2rd [sic] day of January, 2002, upon the following:

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Supreme Court of Kentucky

2000-SC-1101-DG

ANDREW J. MARTIN, ET AL. MOVANTS

V.

ON REVIEW FROM COURT OF APPEALS
99-CA-001367
FRANKLIN CIRCUIT COURT NO.
98-CR-00136-01, 02, 03, 04

COMMONWEALTH OF KENTUCKY RESPONDENT

ORDER

The motion of United States Senator Mitch McConnel [sic] for leave to file his tendered *amicus curiae* brief is granted and the heretofore tendered *amicus curiae* brief is filed.

Wintersheimer, Cooper, Graves and Johnstone, JJ., sitting. All concur. Stumbo, J., not sitting

ENTERED February 13, 2002.

/s/ Joseph E. Lambert
Chief Justice